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RESTATING THE LAW OF PRESCRIPTIVE EASEMENTS

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Prescriptive easements form an important but often overlooked building block in the architecture of property law. Prescription, the doctrine that allows a long-term user of another's land to acquire a prescriptive easement burdening that land without compensating the owner, transforms a trespass into a permanent property right good against the world. Of all the elements of prescription, adverse use or adversity is often the most intensely disputed and often proves to be outcome determinative. Given its importance to prescriptive easement claims, courts have developed a number of presumptions to frame their analysis of the adversity element. For many years, leading treatise writers have advised that if a prescriptive easement claimant establishes that otherwise unexplained use of another's land has occurred in an open and notorious manner and continued without interruption for the statutory prescription period, the claimant's use is presumed to have been adverse to the owner. The same leading authorities acknowledge that a minority of courts employ the opposite presumption—that otherwise unexplained use is presumed to be permissive.

It turns out that the vast majority of U.S. courts employ a hybrid approach to this question, starting with a presumption of adverse use but then applying counter-presumptions of permissive use in a number of special circumstances.

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This Article urges the reporters currently preparing the Restatement of the Law Fourth Property (Restatement Fourth) to institutionalize this hybrid approach and fashion a black letter rule that mirrors the dominant judicial practice. In support of this position, this Article first reviews previous Restatement attempts to clarify the law of prescriptive easements. Next, it analyzes academic scholarship that has defended prescription and its doctrinal cousin, adverse possession, called for their abolition, or advocated for their reform. Finally, this Article offers a detailed discussion of relevant case law in all fifty states and explains why the hybrid approach, what this Article calls the Presumption of Adverse Use with Specialized Exceptions (the PAUSE approach), is consistent with many of the institutional goals of the Restatement Fourth reporters, especially their aim to articulate relatively invariant property rules and yet identify appropriate places for property law to be responsive to context, social norms, and customs.

I. INTRODUCTION

In 2014, the American Law Institute (ALI) initiated a project to produce a Restatement of the Law Fourth Property (Restatement Fourth). Under the leadership of its Reporter Professor Henry Smith, and a team of Associate Reporters (Maureen Brady, Sara Bronin, John Goldberg, Wilson Freyermuth, Daniel Kelly, Brian Lee, Tanya Marsh, Thomas Merrill, and Christopher Newman), the ALI has begun to present preliminary and tentative drafts of early chapters of the Restatement Fourth. In turn, the Council of the ALI has begun to approve some of these chapters.[1]

According to Professor Smith, the Restatement Fourth will restore a systemic and architecturally cohesive understanding of property law—an understanding that was either lost during the process of creating earlier Restatements or was never properly understood by other Restatement drafters.[2] By respecting the "thinghood" of property,[3] the Restatement Fourth will, according to Smith, reveal the distinctive characteristics of property—for example, property's in rem nature and its standardized menu of available forms—that distinguish it from other spheres of private law.[4] Readers of Professor Smith's scholarship and those of Associate Reporter Thomas Merrill may well anticipate that this Restatement will give priority not only to the "right to exclude," but also to other "exclusion strategies" in property law—those conflict resolution mechanisms that Smith and Merrill have long championed as the conceptual core of property law and that compete on an organizational spectrum with "governance strategies."[5] In principle, the Restatement Fourth

1. As of the date of submission of this Article, the Council of the ALI has approved draft chapters of the Restatement Fourth addressing General Definitions, Possession, Property Torts, Bailments, and Land Use Law. *See* RESTATEMENT (FOURTH) OF PROPERTY (AM. L. INST., Council Draft No. 2, 2019); *Restatement of the Law Fourth, Property*, AM. L. INST. (2021), https://www.ali.org/projects/show/property/ [https://www.ali.org/projects/show/property/].

2. *See generally* Henry E. Smith, *Restating the Architecture of Property, in* 10 MODERN STUDIES IN PROPERTY LAW 4–5 (Ben McFarlane & Sinead Agnew eds., 2019).

3. *Id.* at 7.

4. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1706, 1709 (2012); *see also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 7–8 (2000).

5. Smith, *supra* note 4, at 1709–10; *see also* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S3453, S455 (2002); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 790 (2001); Thomas M. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–61 (2001); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998).

should restore coherence and systematic integrity to a body of law that, at least in the view of Smith, Merrill, and other sympathetic property theorists, has been harmed by the reception of legal realism and the "bundle of rights" conception of property into both prior Restatements and general property law discourse.[6]

To be sure, many property scholars disagree with Smith and Merrill's claim that property law and theory are suffering from disintegration and resist the notion that exclusion strategies lie at the center of property law architecture.[7] Despite the theoretical debate over the impact of legal realism and the essential core of property law,[8] this Article accepts Smith and Merrill's theoretical premise that property law should at least aim for some degree of systemic integrity and coherence. Accordingly, this Article offers assistance to the Restatement Fourth reporters in one important, but often overlooked, area of property law—the law of prescriptive easements—one that falls roughly in the middle of the organizational spectrum of property regimes employing either exclusion or governance strategies.[9] Why, the reader might ask, are prescriptive easements worthy of detailed consideration? The answer can be found in the systemic relationship between prescriptive easements and a number of other foundational modules of property law—in particular, trespass, possession, and adverse possession.

Trespass: The first chapter of Volume 2 of the proposed Restatement Fourth addresses "Interferences With, and Limits On, Ownership and Possession" and opens, appropriately, with trespass. The first section of that chapter provides the elements of a prima facie trespass case:

> **§ 1.1. Trespass to Land; Prima Facie Case**
>
> An actor is subject to liability to another for trespass to land if

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6. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 683 (2014); Smith, *supra* note 4, at 1693; Merrill & Smith, *What Happened to Property*, *supra* note 5, at 360, 365.

7. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1290–91, 1294–95 (2014); AJ van der Walt, *The Modest Systemic Status of Property Rights*, 1 J. L. PROP. & SOC'Y 15, 25, 30 (2014); Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1855 (2012); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1043 (2009); Gregory S. Alexander, *The Social-Obligation Norm in Property*, 94 CORNELL L. REV. 745, 747 (2009).

8. For particularly insightful analyses of the debates between property law scholars who emphasize the centrality of exclusion strategies and reduction of information processing costs and those who emphasize the centrality of governance strategies, the plurality of ends served by property law, and social obligations, see Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 184–86 (2017); Jane B. Barron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 919 (2010).

9. Smith, *supra* note 5, at S455.

> the actor intentionally:
>
> (a) enters or causes entry of a tangible thing or a person onto land in the other's possession, or
>
> (b) remains on the land in the other's possession, or
>
> (c) fails to remove a tangible thing that the actor is duty-bound to remove from the land in the other's possession.[10]

However, not every person who "may enter, cause entry, or remain on the possessor's land" in another's possession is liable for trespass. If an actor enters land with the owner or possessor's permission, no liability will follow as long as that entry is within the scope of that permission.[11] Similarly, and crucially for purposes of this Article, an actor who has an easement over another's land is, according to another provision of the proposed Restatement Fourth, "privileged to enter the land at reasonable times and in a reasonable manner for the purpose of enjoying the easement . . . ."[12]

Of course, an easement established by a landowner's express grant or reservation is easy to accommodate within the trespass framework proposed in the new Restatement Fourth. After all, an easement represents one of the specialized property forms conferring limited rights of use that is nevertheless firmly entrenched in the unofficial *numerus clausus* of American property law.[13] A *prescriptive* easement and the doctrine of positive prescription, a method of creating a property interest by the mere passage of time,[14] however, represents a conceptual (and symmetrical) challenge to the traditional framework for trespass. When a claimant convinces a court that the requirements for prescription have been satisfied, the claimant acquires a property right to enter and remain on land in another's possession for the

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10. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 2, Div. I, Ch. 1, § 1.1, at 18 (AM. L. INST., Tentative Draft No. 1, Mar. 27, 2021). Section 1.1. recognizes that a model gist definition would read as follows: "A trespass to land is an intentional physical intrusion upon land possessed by another that interferes with the other's interest in exclusive possession of the land." *Id.* § 1.1.

11. RESTATEMENT (FOURTH) OF PROPERTY,Vol. 2, Div. I, Ch. 1, § 1.6, at 59 (AM. L. INST., Council Draft No. 2, Nov. 27, 2019).

12. *Id.* § 1.17, at 101.

13. Merrill & Smith, *supra* note 4, at 16.

14. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.10(1) (Michael Allan Wolf, ed. 2000) (defining prescription as "the effect of lapse of time in creating or extinguishing property interests") (quoting RESTATEMENT OF PROPERTY, ch. 28, Topic A, Introductory Note). As Powell explains, the creation of an easement results from the "positive consequences of prescription." *Id.* An easement, however, can also be extinguished by the "negative consequences" of prescription. *Id.* This Article is concerned only with the positive prescription.

purposes of the easement, even though the claimant never obtained the express consent of the landowner or possessor.[15]

Unlike the ancient theory of prescription that supposed the existence of a lost grant from the landowner to the claimant, the modern theory of prescription sounds in adverse possession doctrine.[16] Thus, when a person enters another's land and uses that land in a manner that would normally constitute a trespass, and the trespassing use continues uninterrupted, in an open and notorious manner, for a sufficiently long period of time (defined by statute), the trespassing use ripens into a non-possessory interest in land—the prescriptive easement.[17] Courts and commentators are not naive about this interrelationship between trespass and prescriptive easements. Some judges and law professors routinely assert that prescriptive easements should be disfavored because their judicial recognition rewards a trespasser with an uncompensated right to use another person's land.[18] As this Article will reveal, this theoretical concern about unjustifiably rewarding trespass has colored the development of prescriptive easement law in recent years, particularly with respect to the element of adversity.[19]

Possession: The concept of possession forms another foundational pillar of the emerging Restatement Fourth that will intersect with the law of prescriptive easements. Immediately following Division One of Volume I, which defines

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15. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.17 cmt. c (AM. L. INST. 2000).

16. For a succinct account of the development of prescription that explains the transition from "the fiction of the lost grant" to a statute of limitations and adverse possession model, see *Id.* § 2.17 cmt. b. For other historical accounts, see GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 3.23 (3d ed. 2016); JON W. BRUCE & JAMES W. ELY, JR., LAW OF EASEMENTS AND LICENSES IN LAND § 5.1 (Autumn 2020 ed.). Noting that courts in a few states still profess to apply the lost grant theory, Bruce and Ely suggest these statements may be more incantatory than substantive. *Id.* Other scholars, however, argue that judicial adherence to the lost grant fiction can produce meaningful differences, particularly with respect to the adversity element and the source of the relevant statute of limitation. Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 104–05 (2005).

17. BRUCE & ELY, *supra* note 16, § 5.2. Some courts also require a claimant to show that the use was exclusive or with the servient owner's knowledge and acquiescence. *Id.*; KORNGOLD, *supra* note 16, § 3.23.

18. Feloney v. Baye, 815 N.W.2d 160, 165 (Neb. 2012); O'Dell v. Stegall, 703 S.E.2d 561, 570 (W. Va. 2010); BRUCE & ELY, *supra* note 16, § 5.1 (collecting and quoting other decisions stating that prescriptive easements should be disfavored). For similar views of prescriptive easement abolitionists, see *infra* Part III.B.

19. For discussion of judicial decisions adopting a pure presumption of permissive use, see *infra* Part IV.B, and also decisions employing a number of counter-presumptions of permissive use, see *infra* Part IV.C.

basic concepts such as property, things, ownership, owner, title, and relativity of title, the Restatement Fourth will offer its first substantive rules in Volume 1, Division Two, Chapter 1, titled "Possession." The first section of this proposed chapter offers the following foundational definition:

> **§ 1.1. Possession**
>
> A person has possession of a physical thing if the person has established effective control over that thing and manifests an intent to maintain such control to the exclusion of others.[20]

This definition displays many virtues, the least of which is its clear recognition of the two crucial conceptual components of possession: (1) effective control over a physical thing (what civil law scholars call "detention");[21] and (2) a manifested intention to maintain control of the thing to the exclusion of others (what civil law scholars call *animus domini*).[22] A prescriptive easement claim implicates both elements, but the second element—itself containing two sub-elements, the intent to maintain exclusive control *and* the outward manifestation of that intent to others—is especially important in prescriptive easement disputes.[23]

When a person uses another's land openly and notoriously, without the benefit of an effective, written easement agreement, and eventually claims a prescriptive easement, the claimant effectively seeks some measure of exclusive control over the land—possession, or what civil law scholars call

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20. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 1, § 1.1, at 2 (AM. L. INST., Tentative Draft No. 1, Mar. 27, 2020).

21. *See, e.g.*, Eric Descheemaeker, *The Consequences of Possession*, *in* 11 EDINBURGH STUDIES IN LAW 1, 8 (Eric Descheemaeker ed., 2014) (describing "the lowest degree of holding" associated with the civilian concept of possession as "custody" or "detention"); Yaëll Emerich, *Why Protect Possession?*, *in* 11 EDINBURGH STUDIES IN LAW, *supra* note 21, at 31 (noting that "possession is also often distinguished from detention" in civil law and explaining that the famous debate between Savigny and Jhering ultimately "crystallised" around implications of granting possessory protections to a person who merely *detains* property).

22. Descheemaeker, *supra* note 21, at 17 (defining *animus domini* as "an intention to control the thing as the owner," as distinguished from *animus rem sibi habendi*, "an intention to control the thing as a holder"); Emerich, *supra* note 21, at 38–89 (noting that "Savigny argued that the intention animating the possessor should be the *animus domini*: the intention to behave as the owner" and explaining Jhering's position, namely that "possessors and holders have the same intention: to hold and keep the thing, i.e. *animus tenendi*").

23. RESTATEMENT (FOURTH) of PROPERTY, Vol. 1, Div. II, Ch. 1, § 1.1 cmts. f & j, at 6–7 (AM. L. INST., Tentative Draft No. 1, Mar. 27, 2020).

"quasi-possession."[24] Moreover, when a court is convinced that the elements of prescription have been satisfied, the claimant obtains what the Restatement Fourth defines as a "right to possession"—a right to "call upon a court to be put in possession or to be awarded compensation from another for being displaced from possession."[25]

Interestingly, throughout the Introductory Note, Comments, and Reporter's Note to Sections 1.1 and 1.8 of the chapter on possession, the new Restatement Fourth emphasizes the importance of social norms and the social and legal contexts of possession disputes.[26] Thus, perhaps more than other property scholars may realize, this Restatement Fourth—at least in this important area of property law—does not seek to recreate a dogmatic or essentialist approach to possession and the many areas of law in which possession produces significant legal effects.[27] Rather, to quote Professor Smith, in a crucial statement of principle in his Reporter's Note to Section 1.1 of the chapter on possession:

> [O]ne can say that possession has a core meaning, but critical aspects of whether the elements of that meaning have been satisfied will be determined, in any particular context, by the

24. Descheemaeker, *supra* note 21, at 27–29 (explaining the origin of the theory of "quasi-possession" of incorporeal rights in Roman law and following Gaius and the German Pandectists, critiquing its elaboration in France, South Africa and Austria); *see also* LA. CIV. CODE ANN. art. 3421 ("The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.").

25. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 1, § 1.8, at 13 (AM L. INST., Tentative Draft No. 1, Mar. 27, 2020).

26. *Id.*, Intro. Note, at 1 ("Instead, possession is a perceived relationship between persons and things, formed . . . in part by social knowledge about the likely intentions that persons have with respect to things."); *id.* ("Thus, although possession can be given a broad, abstract definition, whether possession exists in any particular context will depend on factors particular to that context."); *id.*, at 2 ("To be useful, any definition of possession must simultaneously link up various legal rights and be open to the world of fact and social norms."); *id.* § 1.1, cmt. b, at 3 ("Possession as a social fact can exist in a variety of contexts."); *id.* § 1.1, cmt. c, at 4 ("Which communicative acts signal effective control and an intention to maintain control may differ from one era to the next, and even from one community to another."); *see also id.* § 1.1, cmts. d & e , at 4–5 (making similar statements).

27. According to Wyman, the "new essentialist" conception of property consists of two core elements: "(i) the putative owner must have a thing; and (ii) he or she must have a broad measure of authority over the thing, an attribute which is often labeled ownership." Wyman, *supra* note 8, at 193. The new essentialists, Wyman notes, also seek to replace a malleable, bundle of rights conception of property with one that is more formalistic, determinate and stable. *Id.* at 184–85.

social norms and customs that apply in that context.[28]

If this statement accurately reflects a guiding principle of the Restatement Fourth, the research findings and primary recommendations of this Article should be welcome news to the Restatement Fourth reporters. Those findings and recommendations stress that American courts often attempt to combine an objective approach to the elements of a prescriptive easement claim with a particular interest in the claim's social and geographic context.[29] In this sense, the emerging conception of possession in the Restatement Fourth should resonate with and form strong systemic links with the law of prescriptive easements.

Adverse Possession: The law of adverse possession constitutes yet one more foundational pillar of the new Restatement Fourth that will have obvious connections with the law of prescriptive easements. Professor Smith and his Associate Reporters have recently begun working on this subject in a preliminary chapter.[30] One admirable feature of this preliminary chapter is its clear focus on the general concept of "adverseness."[31] While Section 2.1 explains how adverse possession operates to extinguish "the remedy and the right of one who had the right to immediate possession" and establishes a "new title" in the adverse possessor claimant who has possessed for the statutory period,[32] Section 2.2 of the chapter makes "adverseness" the definitive characteristic of the kind of possession that produces these legal consequences.[33] In effect, Section 2.2 combines the often-variable "adjectival elements" of an adverse possession claim into a general requirement of "adverseness:"

> **§ 2.2. Adverseness**
> For possession of a thing to be *adverse*, it must be (i) actual, (ii) hostile, (iii) open and notorious, (iv) exclusive, and (v) continuous and uninterrupted.[34]

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28. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 1, § 1.1, Reporter's Note, at 11 (AM. L. INST., Tentative Draft No. 1, Mar. 27, 2020).

29. *See infra* Part IV.C.

30. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 2. (AM. L. INST., Preliminary Draft) (on file with author).

31. RESTATEMENT (FOURTH) OF PROPERTY, Table of Contents, xxiii (AM. L. INST., Tentative Draft, Mar. 27, 2020) (titling Division II, Ch. 2, § 2.2 under the heading "Adverseness").

32. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 2, § 2.1., at 3 (AM. L. INST., Preliminary Draft) (on file with author).

33. *Id.* § 2.2, at 8.

34. *Id.* (emphasis added).

If it remains unchanged, Section 2.2 will focus future Restatement users on the crucial element of *hostility* or *adverseness* in any adverse possession claim.[35] This focus will be beneficial because property law scholars have long recognized that the open-textured character of the hostility or adverseness element provides courts with ample (and, some would argue, too much) opportunity to bring their own anxieties or normative assumptions about adverse possession to bear on the outcome of adverse possession disputes.[36] This focus on hostility and adverseness in the Restatement Fourth's presentation of the law of adverse possession correlates well with the law of prescriptive easements because very frequently this same element cluster will determine the outcome of a prescriptive easement dispute.[37]

According to the ALI's current projected overall Table of Contents for the Restatement Fourth, prescription and prescriptive easements will be addressed in Volume 6 (Servitudes), Division 2 (Easements).[38] Although work on these provisions has not yet begun, the Restatement Fourth reporters will benefit from considering the subject now because of the tight systemic fit—demonstrated in the previous paragraphs—between prescriptive easements and trespass, possession, and adverse possession, subjects currently under consideration by the reporters and the ALI Council. Further, when Professor Smith and his associate reporters eventually begin to draft Restatement provisions directly addressing prescription, they will face the conceptual issues raised directly by this Article.

Findings and Recommendations: This Article offers descriptive findings and normative recommendations that should inform the Restatement Fourth when it addresses the law of prescriptive easements. First, the Restatement Fourth reporters should recognize that the law of prescriptive easements, as reflected in judicial practice, is currently undergoing a modest degree of transformation.[39] This change, however, does not concern the core elements of a prescriptive easement claim. As has been true for decades, a prescriptive easement claimant in most states must still prove that: (1) the claimant or a

35. *Id.*

36. John A. Lovett, *Precarious Possession*, 77 LA. L. REV. 617, 624, 690 (2017); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L. Q. 65, 69 (1986).

37. As the detailed discussion in Part IV of this Article reveals, a court's approach to framing the element of adversity with a presumption of adversity or permissiveness is often, but not always, outcome determinative.

38. RESTATEMENT (FOURTH) OF PROPERTY, Table of Contents, xxxvi (AM. L. INST., Tentative Draft, Mar. 27, 2020).

39. *See* cases cited *infra* Part IV.

predecessor has used another's land in an open and notorious manner; (2) the use of the claimant or predecessor occurred continuously and without interruption for the statutory period; and (3) the use was not in subordination to or with the consent or permission of the owner or possessor; that is, the use was *adverse* to the owner or possessor's interests.[40] In some states, a claimant must also prove that the alleged use is "exclusive."[41] However, this does not mean that "the claimant must be the only person using the easement, to the exclusion of all others."[42] Instead, it just means that the use is "independent and not contingent upon the enjoyment of a similar right by others."[43]

The locus of change, however, concerns the third common element—the element of adversity—and, in particular, the presumptions a court should use when analyzing the permissive or adverse nature of the claimant's use of another's land. According to leading authorities, most American courts adhere to the rule that when a claimant offers prima facie evidence of the other elements of a prescriptive easement claim, the claimant's use is then presumed to be adverse to the landowner, that is, not subordinate to the landowner's interests and without the landowner's permission.[44] To be sure, these authorities also acknowledge a contrary view, supposedly followed by a minority of courts—that a long-term user of another's land must be presumed to be acting with the permission of or in subordination to the landowner.[45]

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40. BRUCE & ELY, *supra* note 16, § 5.2 (listing common elements); KORNGOLD, *supra* note 16, § 3.23 (listing common elements but adding "with the knowledge of or acquiescence of the servient tenement"). For a discussion of the fading importance of "acquiescence" as a separate element because of the demise of the "lost grant theory," see BRUCE & ELY, *supra* note 16, § 5.24.

41. BRUCE & ELY, *supra* note 16, § 5.23.

42. *Id.* Another commentator explains that many courts either do not require exclusive use for a prescription claim or construe the exclusivity requirement liberally in contrast to adverse possession where exclusion of the landowner is necessary to justify shifting actual ownership to the claimant. KORNGOLD, *supra* note 16, § 3.33. As this commentator underscores, the important point about exclusivity, when it is still required as an independent element of prescription, is that there must be "distinctive acts by the individual" which serve to "give the servient owner notice that some activity out of the ordinary is taking place and that a claim is being asserted." *Id.* § 3.31.

43. BRUCE & ELY, *supra* note 16, § 5.23; *see, e.g.*, Melendez v. Holling, 927 N.W.2d 834, 840 (Neb. Ct. App. 2019); Dewey Beach Lions Club, Inc. v. Longanecker, 905 A.3d 128, 137–38 (Del. Ch. 2006) (observing that when an individual prescriptive easement claimant's use is accompanied by overlapping use of alleged servient estate by the general public, the individual claimant must engage in some distinctive act or otherwise communicate an individual claim to the prescriptive easement).

44. 4 POWELL, *supra* note 14, § 34.10(2)(c); JOSEPH WILLIAM SINGER, PROPERTY § 5.4 (4th ed. 2014); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000), discussed *infra* Part IV.A.

45. 4 POWELL, *supra* note 14, § 34.10(2)(c); SINGER, *supra* note 44, § 5.4; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

Finally, to complicate matters further, these same authorities, as well as other authors, note that courts in some states begin their analysis of "adversity" by stating the so-called "majority" presumption of adverse use but then recognize "counter-presumptions" of permissive use in one or more exceptional circumstances.[46] Those circumstances may involve: (1) two parcels of land owned at least at some point in time by family members or relatives; (2) wild, unenclosed, vacant land; (3) joint, non-interfering use of a preexisting road that was constructed or maintained by the landowner; (4) a user who is unrelated to but enjoys close neighborly relations with the landowner; or (5) a broader, locational custom of neighborly accommodation for the type of land at issue.[47]

This outline of presumptions of adversity and permissiveness sketched by the leading treatises and hornbooks is generally correct to the extent it identifies the various framing approaches. However, the authors' assumptions about which approach is the prevailing or majority view is partially mistaken or at least somewhat misleading. As this Article will demonstrate in Part IV.A, the so-called "majority" approach—what this Article calls the Pure Presumption of Adverse Use (PPAU) that arises whenever the claimant has proven the other elements of prescription—is actually a minority approach employed without qualification in only fourteen states.[48]

The fact that this approach is only followed in a minority of states does not mean that it lacks virtues. One great advantage of the PPAU is that it tends to produce consistent outcomes across a wide variety of contexts and thus promotes certainty in the law.[49] Another advantage of this approach is its simplicity and ease of application.[50] Once a claimant establishes the other elements of prescription, a court can concentrate its inquiry on whether the alleged servient estate owner has produced clear and unmistakable evidence of an express or implied grant of permission to rebut the presumption of

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46. 4 POWELL, *supra* note 14, § 34.10(2)(c); SINGER, *supra* note 44, § 5.4; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000). *See also* 7 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 60.03(b)(6)(viii) (David A. Thomas ed., 2018); KORNGOLD, *supra* note 16, § 3.29 (3d ed. 2016).

47. *See infra* Part IV.C.

48. *See infra* Part IV.A.

49. *See, e.g.,* Jesurum v. WBTSCC Ltd. P'ship, 151 A.3d 949, 956 (N.H. 2016); Bonardi v. Kazmirchuk, 776 A.2d 1282, 1284–85 (N.H. 2001); Sandford v. Town of Wolfeboro, 740 A.2d 1019, 1021–25 (N.H. 1999). For discussion of the consistency of outcomes in all of these cases, see *infra* notes 265–88.

50. *See, e.g., Jesurum*, 151 A.3d at 956; *Bonardi*, 776 A.2d at 1284–85; *Sandford*, 740 A.2d at 1021–25.

adversity.[51] A third advantage is avoidance of the evidentiary complication of requiring a claimant to prove a negative—the absence of permission or consent from the landowner.[52] Finally, the PPAU is consistent with the mid-twentieth century, majority, "objective" approach to intentionality in adverse possession law,[53] and with the approach that the Restatement Fourth offers to resolve judicial and academic debates about privileging good or bad faith adverse possessors or requiring color of title in the context of adverse possession.[54] It focuses judicial inquiry on objective factors—open and notorious use and duration of use—and avoids extensive consideration of parties' subjective understandings that may be difficult to assess based on their own self-serving and often contradictory testimony.[55] The primary disadvantage of this approach is that it favors recognition of prescriptive easements without regard to context, particularly the social or geographic context in which a prescription claim arises.[56]

The directly competing approach, what this Article calls the Pure Presumption of Permissive Use (PPPU), also has advantages. Under this approach, even when a claimant provides prima facie evidence of the other elements of a prescriptive easement claim, the court nevertheless will presume that the claimant's use has occurred with the landowner's consent, and therefore, the claimant bears the burden of presenting clear evidence that the use was adverse at its inception or became adverse thereafter.[57] Like its symmetrical twin, the PPPU tends to produce consistent outcomes, albeit

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51. *See* BRUCE & ELY, *supra* note 16, § 5.3; KORNGOLD, *supra* note 16, § 3.23.

52. Arrechea Family Tr. v. Adams, 960 So.2d 501, 505 (Miss. Ct. App. 2006). *See also* KORNGOLD, *supra* note 16, § 3.29.

53. For a classic discussion of the objective approach to possessor intent in adverse possession doctrine, see William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L. Q. REV. 532, 537–38 (1939). For a discussion of how Walsh's objective theory of adverse possession was transplanted into James Casner's canonical statement of the law on this subject, see 3 AMERICAN LAW OF PROPERTY § 15.2 (A. James Casner ed., 1952); *see also* John Lovett, *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881–1986)*, 5 TEX. A&M L. REV. 1, 28–30 (2017).

54. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 2, § 2.3, at 18 (AM. L. INST., Preliminary Draft) (on file with author) (rejecting either a good faith or bad faith requirement and a color of title requirement for adverse possession). Instead, the Restatement Fourth proposes to address judicial and legislative discomfort with bad faith adverse possession through restitution and equitable forms of relief, including recognition of constructive fraud. *Id.* § 2.4, at 23–25.

55. *See infra* Part IV.A

56. For a detailed discussion of the advantages and disadvantages of the PPAU, see *infra* Part. III.A. and Part IV.A.

57. KORNGOLD, *supra* note 16, § 3.29; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

outcomes that favor the underlying landowner.[58] This approach also has the advantage of reflecting what some judges and lawyers believe should be the law's disapproval of both prescription and adverse possession given that both doctrines recognize an uncompensated, nonconsensual acquisition of a property right.[59] Finally, as the critics and reformers of prescription and adverse possession note, this approach avoids the twin problems of encouraging trespass and discouraging neighborly accommodation.[60]

Although a claimant can conceivably rebut the PPPU and establish a prescriptive easement by proving the absence of consent or a clearly noticeable adverse use, the great disadvantage of this approach is its tendency to mow down even the strongest prescriptive easement claims, including those that arise when a claimant or the claimant's predecessor has openly and notoriously used another's land for an extremely long time and that use is widely recognized in the community as undertaken as a matter of right.[61] Another disadvantage is evidentiary; it requires the claimant to prove a negative.[62]

Perhaps because of these disadvantages the PPPU remains a minority approach, used exclusively in just seven states.[63] Despite this relative unpopularity, however, the PPPU has gained adherents in recent years.[64] In 2010, the West Virginia Supreme Court adopted this approach in an important decision whose rationales have been noted by prominent treatise authors.[65]

As this Article will demonstrate in Part IV.C, by far the most widespread approach to framing the adversity inquiry in U.S. prescriptive easement case law is for a court to begin by articulating the PPAU but then apply a counter-presumption of permissive use applicable to a particular context. This approach, the Presumption of Adverse Use with Specialized Exceptions (PAUSE), recognizes the value of beginning with an objective approach to prescription and the specific question of the parties' intentions but then employs a contextual approach to identifying specific factual circumstances that justify

58. *See infra* Part IV.A.

59. Wyo-Ben, Inc. v. Van Fleet, 361 P.3d 852, 861 (Wyo. 2015).

60. For discussion of all of these arguments, *see infra* Parts III.B and C.

61. *See e.g.,* O'Dell v. Stegall, 703 S.E.2d 561, 586 (W.Va. 2010). For a detailed discussion of the disadvantages of the PPPU, *see infra* Part IV.B.

62. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

63. *See infra* Part IV.B.

64. *See* cases cited *infra* notes 296–302 and accompanying text. *See also infra* Part IV.B.

65. BRUCE & ELY, *supra* note 16, § 5:1 (quoting *O'Dell*, 703 S.E.2d at 586).

application of a counter-presumption of permissive use.[66] Although this approach might seem to add considerable complexity and uncertainty to prescriptive easement doctrine, some of the exceptional circumstances that require a shift in presumptions—family status and wild, vacant and unenclosed lands, for example—are relatively easy to identify and thus can produce relatively consistent outcomes across a wide spectrum of cases.[67]

Admittedly, the scope of several of these counter-presumptions—especially those involving use of shared roads and allegations of neighborly accommodation and community custom—are more difficult to define. However, they do at least encourage courts to conduct careful contextualized inquiries, a practice particularly appropriate for cases in which both the claimant and record owner point to significant reliance interests and expectations.[68] Finally, application of the counter-presumption based on alleged local customs of neighborly accommodation requires litigants to prove and courts to examine social norms in a particular community—one of the key legal jobs that Professors Smith and Merrill contend is appropriate in the law of possession itself.[69]

Given the recent developments in judicial practice described above and the crucial role that presumptions of adverse and permissive use play in the resolution of prescriptive easement disputes,[70] this Article contends that the Restatement Fourth Reporters should formulate a specific rule regarding adversity and/or permission. Stating a rule would be particularly appropriate if the Restatement Fourth team wants its work product to help lawyers and judges resolve the most difficult cases, a goal that, according to Merrill and Smith, earlier Restatements of Property have too infrequently achieved.[71]

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66. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000). *See also* cases discussed *infra* Part IV.C.iv.

67. *See infra* Part. IV.B.

68. *See infra* Part. IV.B.

69. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 1, Intro. Note, at 1–2 (AM L. INST., Tentative Draft No. 1, Mar. 27, 2020); *Id.* § 1.1, reporter's note, at 10–12.

70. In many cases, a court's choice about the underlying presumption will be outcome determinative. *Compare* Lyndes v. Green, 325 P.3d 1225, 1230 (Mont. 2014) (applying presumption of adverse use and rejecting application of specialized "neighborly accommodation" exception), *with* Burnham v. Kwentus, 174 So.3d 286, 293 (Miss. Ct. App. 2015) (applying presumption of permissive use because of interest in promoting "neighborly courtesy").

71. Merrill & Smith, *supra* note 6, at 682, 694, 707 (noting that the ALI's royalty payments for downloads of the *Restatement of Property* pale in comparison to those for the *Restatement of Contracts* and the *Restatement of Torts* and complaining that courts have "largely ignored the reforms urged by

As to the content of that rule, this Article recommends that the Restatement Fourth reporters formulate a carefully circumscribed version of the PAUSE approach. Although systemic integrity, reduction in information processing costs, and modularity are all useful features of property law writ large,[72] it is striking how often judges faced with difficult prescriptive easement disputes focus on specific circumstances and contexts.[73] Rather than resort to uniform presumptions that apply with relative invariance across contexts,[74] many courts prefer the highly contextualized framing analyses represented by the PAUSE approach.[75] In essence, these courts recognize that prescriptive easement claims are rarely alike and that the differences in the factual circumstances merit different analytical frameworks.[76] As the Nebraska Supreme Court once put it, a presumption of permissive use may be perfectly appropriate for "unenclosed and undeveloped land" (i.e., wilderness), but not for "an enclosed parking lot in a downtown shopping center" or "a driveway in a suburban neighborhood."[77]

In short, the actual practice of the majority of courts in prescriptive easement cases reveals a highly contextualized, relational approach to property law decision making.[78] Perhaps this is true solely with respect to this corner of property law. Perhaps relational analysis flourishes in prescriptive easement cases precisely because these are essentially bilateral disputes between neighbors who must continue to live next to one another for years to come, and, recognizing their high stakes (both emotionally and practically), judges are reluctant to articulate "one-size-fits-all" rules that could box parties into zero-

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the *Restatement (Third) of Servitudes*," particularly in connection with abandonment of privity of estate and the touch and concern requirement for servitudes and claiming generally that the ALI's first *Restatement of Property* built on a Hohfeldian, bundle-of-rights foundation "has seen relatively little use, and has had relatively limited influence").

72. *See generally id.*; Smith, *supra* note 4; Merrill & Smith, *What Happened to Property*, *supra* note 5.

73. *See e.g.*, O'Banion v. Borba, 195 P.2d 10, 13 (Cal. 1948) ("The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom."). *See also* cases cited *infra* Part IV.C.iv.

74. Smith, *supra* note 4, at 1711 (describing the virtue of property law's tendency to decontextualize and "keep the interface simple and standardized" and thus its "relative invariance (not complete variance) to context").

75. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM L. INST. 2000).

76. *See e.g.*, Feloney v. Baye, 815 N.W.2d 160, 165 (Neb. 2012); Melendez v. Holling, 927 N.W.2d 834, 840 (Neb. Ct. App. 2019).

77. *Feloney*, 815 N.W.2d at 166.

78. For examples of cases in which courts approach different presumptions, see *infra* Part IV.

sum outcomes that produce long-lasting neighborly tension or result in substantial economic waste.[79]

In light of these high stakes and the research findings disclosed in Part IV, this Article recommends that the Restatement Fourth follow the lead of the actual majority of U.S. courts and create a rule for the presumption of adversity in prescriptive easement law that tracks the PAUSE approach. That rule should state that when a prescriptive easement claimant offers prima facie evidence establishing open and notorious use of the alleged servient estate that has occurred continuously and without interruption for the statutory period, that use should be presumed to be adverse—i.e., hostile and not in subordination to the landowner's interests—unless the putative servient estate owner can establish that one of the following conditions exists:

> (1) the current parties or their predecessors shared a family relationship;
> (2) the current parties or their predecessors were linked at some point by a prior contractual relationship such as a license or related right of way or easement contract;
> (3) the claimant or claimants seek recognition of an easement in gross benefiting the public at large;
> (4) the land forming the alleged servient estate is wild, unenclosed, and undeveloped (i.e., a wild lands exception); or
> (5) a well-understood community custom of neighborly accommodation in the locality in which the dispute arises.

Although several U.S. courts have adopted a counter-presumption of permissive use based on a general allegation of a history of neighborly accommodation, such an exception to the PPAU is too broad and would cause too much turmoil in the law of prescriptive easements.[80] Similarly, although some courts have constructed elaborate versions of the PAUSE approach related to the particular construction history and use of a road on which a prescriptive easement is claimed (what this Article calls "Road Stories")[81],

79. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 56–59, 78–79 (1987) (describing prescription as a solution to the "geo-metric box" allocation of property rights associated with standard fee simple estate and trespass and allowing flexible reallocation of property rights and avoidance of bilateral monopoly impediments to bargaining); Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 665 (2013) (arguing for an interest-outcome approach to high stakes property disputes such as claims involving easements by estoppel).

80. *See e.g.*, Gamboa v. Clark, 348 P.3d 1214, 1218–19 (Wash. 2015) (applying a counter-presumption of permissible use when evidence suggests a pattern of neighborly accommodation); *see also infra* Part. IV.C.iv.

81. *See infra* Part IV.C.iii (discussing road stories).

these counter-presumptions are too idiosyncratic and complex to generalize into Restatement rules and also, if adopted broadly, would overwhelm the basic doctrine of prescription. Consequently, rather than institutionalize these two categories of PAUSE exceptions, the Restatement Fourth should simply observe that the cases involving these last two kinds of counter-presumptions reveal the importance of careful, contextualized fact-finding in inherently challenging prescriptive easement cases.

The plan of this Article is as follows. To set the stage, Part II reviews how earlier Restatements addressed prescriptive easements. Part III examines recent academic literature addressing prescription and, to the extent it is related, adverse possession, including defenses of those doctrines, calls for their abolition, and proposals for their reform. Part III recommends that the architects of the Restatement Fourth resist calls to abolish or radically transform prescription and instead focus on formulating a workable set of presumptions relating to adversity. Part IV of the Article reviews case law and reveals how the various presumptions work in practice. Part IV.A focuses on the so-called majority approach to adversity, the PPAU and discusses its advantages and disadvantages. Part IV.B turns to the PPPU and discusses the rationales offered for it and explains its drawbacks. Part IV.C addresses the currently dominant approach, the Presumption of Adverse Use with Specialized Exceptions (PAUSE). This part examines the various PAUSE framing analyses, generalizes and regroups these exceptions, and highlights the advantages and disadvantages of the various versions of the PAUSE approach. This part argues that if the Restatement Fourth reporters see their task, at least in part, as one of restating the dominant practice in U.S. law but also recommending useful and normatively attractive advances in the law, they should adopt the particular contours of the five-part PAUSE approach outlined above to the extent they formulate express presumptions for adversity in the context of prescriptive easements. Part IV.D briefly addresses jurisdictions where the law is unclear. Part V concludes by offering a sample Restatement rule based on the five-part PAUSE approach presented above.

II. PREVIOUS RESTATEMENTS OF THE LAW OF PRESCRIPTIVE EASEMENTS

Previous attempts to restate the law of property have made significant contributions to the law of prescriptive easements.[82] In particular, prior Restatements clarified the essential elements of a prescriptive easement claim

82. *See generally* RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 457 (AM. L. INST. 1944).

and focused attention on the critical issue of whether a claimant's use is adverse.[83] They did not however, address when, if ever, courts should use a presumption of adversity.[84] The current drafters of the Restatement Fourth thus have a significant opportunity to advance and clarify the law.

Restatement First: In Volume V of the Restatement of Property, published in 1944 (Restatement First), the ALI made its initial attempt to state comprehensive rules for the creation of a prescriptive easement.[85] Oliver Rundell, a member of the University of Wisconsin Law Faculty, served as Reporter for the editorial group that worked on the project that was labeled "Restatement of the Law of Property, Division V, Servitudes."[86] Section 457 of that volume sets forth the elements of a prescriptive easement claim with admirable simplicity:

> **§ 457. Creation of Easements by Prescription**
> An easement is created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is
>
> (a) adverse, and
>
> (b) for the period of prescription, continuous and uninterrupted.[87]

By requiring a claimant to prove only two basic elements—(1) the alleged use is adverse and (2) the alleged use is continuous and uninterrupted for the statutory period—this formulation, much like the current early draft of adverse possession rules for the Restatement Fourth,[88] achieves both radical compression and ease of application.[89]

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83. *Id.*

84. *Id.*

85. *Id.* (setting forth rules for creation of easements by prescription); *id.* at § 477 (setting forth rules regulating extent of easements created by prescription).

86. *Id.* introductory cmt. *See also* Merrill & Smith, *supra* note 6, at 688 (reviewing the history of Restatements of Property).

87. RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 457 (AM. L. INST. 1944).

88. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 2 (AM. L. INST., Preliminary Draft) (on file with author); *id.* §§ 2.1 and 2.2.

89. A comment to Section 457 also explains that since easements are "incorporeal interests," a person who enjoys "an easement in particular land is not and cannot be thereby in *possession* of the land; he can only *use* it." RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 457 cmt. a (AM. L. INST. 1944) (emphasis added).

In its next section, the Restatement First focuses on the initial element—adversity:

> **§ 458. Adverse Use**
>
> A use of land is adverse to the owner of an interest in land which is or may become possessory when it is
>
> (a) not made in subordination to him, and
>
> (b) wrongful, or may be made by him wrongful, as to him, and
>
> (c) open and notorious.[90]

Despite its somewhat tortuous syntax, this section actually clarifies the law in several constructive ways. First, subsection 458(a) underscores that adverse use is simply insubordinate use and thus need not be hostile in any laymen's sense of that term.[91] Next, by stating that adverse use must be "wrongful," subsection 458(b) connects a prescriptive easement claim to the tort of trespass.[92] Read together, both subsections remind the legal community that when land is used by a non-owner in a manner that is *insubordinate* to the landowner's interest, the owner can normally enjoin the insubordinate use and, if warranted, obtain monetary damages.[93] Finally, subsection 458(c)'s placement of "open and notorious" use as a sub-element of adverse use signals that the claimant's use must be obvious enough to give the landowner reasonable notice of the need to take action to terminate the use if it is unwanted.[94]

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90. RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 458 (AM. L. INST. 1944).

91. The comments to Section 458 make this point more fully:

> To be adverse it is not essential that a use be hostile. It is not necessary that it be made either in the belief or under a claim that it is legally justified. It is, however, necessary that the one making it shall not recognize in those as against whom it is claimed to be adverse an authority either to prevent or to permit its continuance. It is the non-recognition of such authority at the time a use is made which determines whether it is adverse.

Id. § 458 cmt. c.

92. *Id.* § 458 cmt. e.

93. *Id.* § 458 cmt. f ("Commonly, uses which are adverse to particular interests are wrongful as to the owners of such interests and subject . . . the user to civil liability. When this is true, a person against whom the use is claimed to be adverse has the opportunity to protect himself by vindicating his rights through legal proceedings.").

94. *See id.* § 458 cmts. h, i. The linkage between "open and notorious" use and a landowner's "reasonable opportunity" to learn of the claimant's use is now quite commonplace. KORNGOLD, *supra* note 16, § 3.23. This linkage also explains why a claimant cannot satisfy the "adverse use" requirement when the parties enjoy a special relationship or when the claimant engages in active concealment. RESTATEMENT (FIRST) OF PROPERTY SERVITUDES § 458 cmts. j, k (AM. L. INST. 1944).

Just as in the early draft of the Restatement Fourth chapter addressing adverse possession,[95] the comments to Section 458 of the Restatement First assert that a prescriptive easement claim should be analyzed independently of a claimant's state of mind, provided, of course, the claimant is not acting with the landowner's permission.[96] In other words, the success of a prescriptive easement claim should not depend on whether the claimant is acting in good faith (or, for that matter, bad faith); instead, what matters is simply non-subordination, i.e., adversity.[97] Not coincidentally, Section 458 mirrors the dominant mid-twentieth century view that the objective fact of possession, and not the claimant's state of mind, should be the focus of adverse possession analysis.[98] Despite these many virtues, the Restatement First did not address presumptions of adversity or permissiveness and thus left a significant gap in the law of prescriptive easements.

Restatement Third: The Restatement (Third) of Property: Servitudes (Restatement Third), published in 2000, attempted to unify and modernize the law of easements, covenants, servitudes, and profits, along with the law addressing common interest communities.[99] Despite its sweeping ambition, the Restatement Third offers only two sections addressing prescriptive easements:

> **§ 2.16 Servitudes Created by Prescription; Prescriptive Use**
>
> A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either
>
> (1) a use that is *adverse* to the owner of the land or the interest in land against which the servitude is claimed, or

95. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II. Ch. 2, §§ 2.3, 2.4 (AM. L. INST., Preliminary Draft) (on file with author), discussed *supra* note 42.

96. RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES § 458 cmts. d (AM. L. INST. 1944).

97. *Id.* § 458 cmts. d, f, illus. 2, 4.

98. Lovett, *supra* note 53, at 24–35.

99. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, introductory cmt. (AM. L. INST. 2000). *See also* John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 47–52 (2005) (explaining debate surrounding preparation of Restatement Third and four leading models for reform and unification of the law of servitudes). For subsequent assessments of whether the Restatement (Third) achieved its aims and quantitative measurements of its impact on U.S. case law, see Ronald H. Rosenberg, *Fixing a Broken Common Law—Has the Property Law of Easements and Covenants Been Reformed by a Restatement?*, 44 FLA. ST. U. L. REV. 143, 145 (2016); V. William Scarpato, Comment, *"Is" v. "Ought," or How I Learned to Stop Worrying and Love the Restatement*, 85 TEMP. L. REV. 413, 415 (2013).

> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.
>
> **§ 2.17. Servitudes Created by Prescription: Requirements**
> A servitude is created by prescriptive use of land, as that term is defined in § 2.16, if the prescriptive use is:
>
> (1) open and notorious, and
>
> (2) continued without effective interruption for the prescriptive period. . . .[100]

Read together, these two sections establish two distinct pathways to a prescriptive easement. First, Section 2.16(1) points toward the familiar path of adverse use that occurs when a claimant uses another person's land without relying on a written instrument intended to create an easement.[101] Section 2.16(2), however, recognizes that sometimes parties execute an agreement intended to create an easement by grant or reservation but fail to achieve this end for technical reasons.[102] Section 2.16(2) thus permits a prescriptive easement to come into existence even though the claimant or a predecessor used the land, in some sense, with the landowner's consent.[103] With this second consensual pathway to obtaining a prescriptive easement, the Restatement Third sought to clarify that prescription could still serve a "title-curing" function when a conveyancing error has caused a kink in the chain of title but the user and record owner both acted as if a valid easement had been created.[104] Although this modest innovation has caused some controversy among

100. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.16–2.17 (AM. L. INST. 2000) (emphasis added).

101. *Id.* § 2.16 cmt. b.

102. *Id.* § 2.16 cmts. b, d, h (listing the following defects: the parties may fail to sign the writing; the agreement may misidentify the benefited person or property; or, the parties may fail to use separate documents for simultaneous conveyance of an easement to one person and a servient estate to another). Other doctrines, however, such as detrimental reliance, estoppel, implication from prior use, or implication from maps, boundary reference or a general plan, may permit establishment of an easement under these circumstances. *Id.* § 2.16 cmt. d (referring to *id.* § 2.10).

103. *Id.* § 2.16 cmt. a.

104. *Id.*

commentators,[105] several courts have applied Section 2.16(2) without any apparent unease.[106]

For prescriptive easement claims based on more traditional adverse use, the textual provisions of the Restatement Third return to the radical compression of the Restatement First. The only innovation here is that the traditional requirement of "open and notorious" use now reappears as a distinct element.[107]

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105. *Compare* KORNGOLD, *supra* note 16, § 3.23 (praising Section 2.16 because it "avoids the use of fictions or presumptions that some courts use to force imperfect consensual transactions into the prescription framework"), *with* BRUCE & ELY, *supra* note 16, § 5.11 (expressing concern that Section 2.16(2) could allow courts to recognize a prescriptive easement when no writing exists at all and claimant's use originates with a purported oral grant or agreement) *and* Hernandez, *supra* note 16, at 106 (arguing that cases addressed by Section 2.16(2) would be more equitably addressed by supplementing or reforming the defective deed under contract law principles or by applying easement estoppel principles). The Restatement (Third) acknowledged that Section 2.16(2) could be applicable in cases involving intended servitudes that are "implied as well as express," and thus recommended that claims based on this section be "accepted cautiously because they directly thwart the purpose of the Statute of Frauds to force parties to provide written evidence of the existence and terms of interests in land." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmts. h, i (AM. L. INST. 2000).

106. Courts have most often applied Section 2.16(2) in the context of common or immediately adjacent driveways. *See* Burciaga Segura v. Van Dien, 344 P.3d 1009, 1010 (N.M. Ct. App. 2014) (applying Section 2.16(2) to establish prescriptive easement over common driveway built for benefit of both tracts where original owners intended to grant landowner an easement but failed to reduce agreement to a writing); Paxson v. Glovitz, 50 P.3d 420, 424–26 (Ariz. Ct. App. 2002) (stating the same); Mulcahy v. Verhines, 742 N.W.2d 393, 397–98 (Mich. Ct. App. 2007) (citing and quoting Section 2.16(2) to find that claimants' use of driveway on adjacent lot was made pursuant to an intended but imperfectly created servitude). In another noteworthy decision, the Colorado Supreme Court applied Section 2.16(2) to an 1863 document executed by an original land grant holder purporting to grant the right to pasture livestock and remove timber to the first settlers he recruited to the land. Lobato v. Taylor, 71 P.3d 938, 954–55 (Colo. 2002) (upholding the prescriptive easement claim of the early settlers' descendants, the court in *Lobato* noted the other elements required to establish a prescriptive easement were all clearly present, including ample evidence of open and notorious use for more than 100 years). The court also observed that, even though it was imperfectly executed, the 1863 document was clearly intended to grant perpetual rights to the predecessors of the current claimants. *Id. But see id.* at 969–71 (Kourlis, J., dissenting) (contending that Section 2.16(2) is inconsistent with Colorado statute and precedent, both of which require "adversity," and that even if applicable, the Beaubien Document was only intended to create a "a communal grant to lands within a particular area," not a servitude). *See also* BRUCE & ELY, *supra* note 16, § 5.11 (criticizing majority opinion in *Lobato*).

107. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.17(1) (AM. L. INST. 2000). Perhaps because Section 2.17 does not break any new ground conceptually, this provision has received generally favorable but muted attention by the courts. *See* Rosenberg, *supra* note 99, at 175–76 (observing that Section 2.17 had been mentioned 57 times by courts in reported decisions, with a majority of these references being of "modest effect," 32% "considered influential," only 5% relying heavily on the provision, and with only two cases declining to adopt the provision).

The most significant development in the Restatement Third concerning traditional, non-consensual prescription actually surfaces in the comments, especially the comments to Sections 2.16 and 2.17, which, for instance, explain the differences between prescription and adverse possession,[108] review and synthesize the primary theoretical bases for prescription,[109] and account for the systemic *benefits and costs* of recognizing prescriptive easements.[110] These comments present clear, balanced, and incisive summaries of the law and competing policies.[111]

Comment g to Section 2.16 is particularly important for purposes of this Article as it introduces the important topic of presumptions of adversity or permissiveness.[112] With some understatement, this comment initially admits that "[t]he question whether a use was adverse, made pursuant to an implied servitude, or permissive, in the inception is often difficult to answer."[113] It then explains that, after abandonment of the lost-grant theory, courts began to justify recognition of prescriptive easements by adopting a "presumption that an unexplained use continued for the prescriptive period is a prescriptive use, rather than permissive."[114] Finally, the comment sums up the law on presumptions in the following terms:

> The majority of American states apply a presumption that an unexplained, open or notorious use of land, continued for the prescriptive period, is adverse, or made pursuant to an implied

108. *Id.* § 2.17 cmt. a.

109. *Id.* § 2.17 cmts. b, c.

110. *Id.* § 2.17 cmt. c. Comments i and j to Section 2.17, which address the mental and physical aspects of the continuous use requirement and interruption of use, are also quite instructive and were relied upon extensively by the Utah Supreme Court in Harrison v. SPAH Family Ltd., 466 P.3d 107, 114–18 (Utah 2020).

111. Comment b to Section 2.17 is particularly notable for its articulation of four rationales for prescription and for explaining why two rationales, the reliance interest notion that "long-continued enjoyment or use of property may create an entitlement" and the theory of repose ("the time for asserting legal claims should be limited"), triumphed over the notion that "use or possession for a period of time may perfect a flawed title" and the "lost-grant fiction." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.17 cmt. b (AM. L. INST. 2000). Comment c assesses the positive and negative effects of prescription from a systemic perspective, acknowledging, on the positive side, its benefits in protecting the reliance interests that can arise from long-term use and enjoyment and, on the negative side, the increased costs for land acquisition and development imposed by requiring more rigorous on-site inspection and the negative social costs that may result if prescription discourages neighborly accommodation. *Id.* § 2.16 cmt. c.

112. *Id.* § 2.16 cmt. g.

113. *Id.*

114. *Id.*

> servitude. This presumption of prescriptive uses gives effect to the idea that long-continued uses create expectations of entitlement and favors existing users over newcomers who would disrupt established neighborhood practices of land use and access.[115]

This important claim may well have been descriptively accurate when drafted in the late 1990s. As this Article reveals, however, the actual practice of courts in many states is considerably more complex.[116]

To be fair, comment g does list many of the counter-presumptions of permissive use that arise in specialized circumstances,[117] the subject of Part IV.C below. The comment also acknowledges that courts in some states ("a minority of jurisdictions") adopt a presumption of permissive use based on "perceptions that Americans are both neighborly and litigious," and, therefore, unauthorized uses presumably would draw objections from landowners.[118] Comment g explains the justification for this alternative approach by pointing to society's interests in advancing development and encouraging landowners to pay for property rights they would normally impose on others.[119] The Reporter's Notes provide ample citations to support all of these general statements.[120] Importantly, however, the Restatement Third does not indicate which approach does the best job of establishing a general framework for presumptions of adversity or permissiveness in the context of a prescriptive easement claim.[121]

III. SCHOLARLY PERSPECTIVES ON PRESCRIPTIVE EASEMENTS

In recent years, only a handful of commentators have specifically focused on prescriptive easements.[122] More commentators, however, have discussed

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115. *Id.*

116. *See e.g.*, O'Dell v. Stegall, 703 S.E.2d 561 (W.Va. 2010); Boudreaux v. Cummings, 167 So.3d 559, 563 (La. 2015); *see also* cases *infra* Part IV.

117. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

118. *Id.*

119. *Id.*

120. *Id.* § 2.16 cmt. g, reporter's notes.

121. *See generally id.*

122. Donald C. Morgan, Comment, *Balancing Interests: How the Prescriptive Easement Doctrine Can Continue to Efficiently Support Public Policy*, 50 WAKE FORREST L. REV. 1253, 1256 (2015); McKay Cunningham, *Oil and Water: Easements and the Environment*, 85 ST. JOHN'S L. REV. 869, 871 (2011); Hernandez, *supra* note 16, at 77; William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,* 31 LAND & WATER L. REV. 79, 82 (1996).

prescriptive easements in the context of larger arguments about adverse possession doctrine or at least made arguments about adverse possession that bear on prescription.[123] A wide look at both streams of commentary reveals the emergence of three camps in the debate over the value and role of prescription and adverse possession in American property law.[124] One camp consists of defenders of the doctrines. Another consists of abolitionists. A third group is made up of reformers. The following review seeks to capture the broad strokes of the academic debate and glean lessons relevant to the problem of framing presumptions of adversity and permissiveness in the context of prescriptive easements—the primary focus of this Article.

A. Defenders

In recent years, several academic commentators have actively defended prescriptive easement doctrine in particular and others have made strong theoretical cases for preserving the essential features of adverse possession law more generally. This scholarship should generally buttress the resolve of the Restatement Fourth reporters to preserve the core of current prescription and adverse possession doctrine. The defenders draw on a wide range of theoretical positions (from consequentialist to rights-based approaches) to justify preservation of both prescription and adverse possession.

One strand of utilitarian justification stresses that the availability of a prescriptive easement claim helps to solve bilateral monopoly situations arising among neighbors when one neighbor's actions have deviated from the "geometric box" allocation of rights represented by the standard fee simple title and

123. *See generally infra* Parts III.A and III.C. For a review of adverse possession scholarship dating from 1881–1986, see Lovett, *supra* note 53, at 24–35.

124. One group of scholars argue that the entire doctrine of prescription should be abolished. *See generally* Hernandez, *supra* note 16; Cunningham, *supra* note 122; Ackerman & Johnson, *supra* note 122. Another actively defends prescriptive easement doctrine in particular and others have made strong theoretical cases for preserving the essential features of adverse possession law more generally. *See generally* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2420 (2001); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1131 (1985); Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161, 161–62 (1995); Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 75–78 (2010); Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 438 (2017). Finally, a third group advocates for reform rather than a full abolition. *See e.g.*, Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037 (2006); Sterk, *supra,* note 79. For a full explanation of each camp, see *infra* Part III.A–C.

the law of trespass.[125] For scholars in this tradition, prescription permits an efficient "cross-boundary" reallocation of property rights, primarily because one landowner's long-term use of his neighbor's property indicates that the use does not significantly interfere "with the use value of the neighbor's land" and particularly when the neighbor "need do so little to interrupt the prescriptive period."[126] Although prescription's rules are "inherently flexible," the "fixed time requirement and the factual predicates for establishing prescriptive rights" provide a relatively firm background against which healthy Coasian negotiation can subsequently occur.[127]

Another utilitarian strand of justification worries about the possibility of a record owner lulling an adverse possessor or prescription user into constructing substantial improvements on the record owner's land and then seeking to extract quasi-rents from the possessor or user once the latter has sunk substantial resources into those improvements.[128] The capacity of adverse possession and prescription to discourage this kind of opportunistic behavior supports both doctrines and encourages landowners to monitor their land and file timely trespass actions against adverse possessors and prescriptive users.[129]

This same concern about lulling possessors and users into a position of vulnerability is shared by scholars who worry less about economic efficiency and more about protecting the legitimate reliance interests of possessors and users.[130] When a non-owner user reasonably relies on access to or control over material resources owned by another, the user can legitimately acquire property rights in those resources.[131] Prescriptive easement doctrine illustrates this theory because property entitlements shift based on both the user's continued reliance on access to the owner's land and the owner's acquiescence to that

125. Sterk, *supra* note 79, at 55–56; *see also* Dyal-Chand, *supra* note 79, at 665–78 (following Sterk by applying insights from Coase and the property rule-liability rule paradigm but adding a more complex interest-outcome approach).

126. Sterk, *supra* note 79, at 56–59, 78.

127. *Id.* at 79.

128. Merrill, *supra* note 124, at 1131; Miceli & Sirmans, *supra* note 124, at 161–62.

129. *See* Bjorn Hoops, *Legal Certainty Is Yesterday's Justification for Acquisitions of Land by Prescription. What is Today's?*, 7 EUR. PROP. L.J. 187, 193–97 (2018) (explaining two variations of a common justification for adverse possession and acquisitive prescription at civil law that fall under the general heading of owner negligence: (1) punishing owners who "sleep on their rights" by not monitoring and controlling the use of their land; and (2) punishing owners who do not make productive use of their land).

130. *See generally* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L. Q. 739 (1986).

131. *See generally* Singer, *supra* note 130.

access.[132] For scholars in this tradition, the record owner's passivity in lulling the long-term user into reliance makes the long-term user the more vulnerable of the two individuals in this property relationship.[133]

In recent years, a number of scholars have also made strong philosophical arguments for the continuation of adverse possession (and thus prescription) doctrine by focusing on the role that the doctrine plays in encouraging productive use of land and resources and encouraging the active communication of claims about productive use.[134] In this strand of property theory, adverse possession is valuable because it reinforces the capacity of ownership to prevent quarrels over resource allocation and to encourage productive use and care for resources.[135] An owner who "pays so little attention to what he owns that he neither sells it nor intends to put it to a productive use" forfeits his right to preserve undiminished title to the person who does put the resource to productive use.[136]

Another prominent version of this grain of scholarship emphasizes that a landowner *deserves to lose title* to his land if he fails to exercise the essential sovereignty of that role.[137] If the owner fails to *set the agenda* for the land in the first place and fails to make others conform to that agenda, or fails to detect or terminate a use *inconsistent* with the owner's agenda, that person has no reason to complain about losing a property interest.[138] However, one corollary

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132. *Id.* at 669–70.

133. *Id.* at 670. For a meditation on the difference between individualist and altruistic arguments in favor of adverse possession and prescription, see *id.* at 667 n.180 (discussing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)).

134. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 142–44 (2006); *see also* Fennell, *supra* note 124, at 1040.

135. GORDLEY, *supra* note 134, at 144. Writing from an Aristotelian and Thomistic perspective and drawing on the work of the "late scholastics," Gordley acknowledges that the clearing title rationale offered for adverse possession and acquisitive prescription by Ballantine and others has weaknesses and was undermined by the German land registration model. *Id.* at 140–42. However, Gordley endorses what some call the development model or the sleeping/earning justification for the doctrines—the idea that the doctrines justifiably transfer title from an absent, passive owner to a productive user. *Id.* at 142–44.

136. *Id.* at 144.

137. Katz, *supra* note 124, at 75–78.

138. *Id.* at 63–70. Although her theory is complex, Katz essentially argues that adverse possession works because it allows property law to identify objects which are subject to an *agenda-setting vacancy*. Katz celebrates adverse possession as an institution that guarantees that all objects have someone in charge—an agenda setter—someone who exercises sovereign-like authority over the object of ownership. *Id.* at 51–52, 66–68, 77. Thus, the successful adverse possession claimant, in

of this view, potentially relevant to the consideration of presumptions of adversity, is that an adverse possession claimant should be required to prove that he has "in effect ousted and intended to oust the true owner."[139] Conversely, a "friendly or amicable relationship between the adverse possessor and the owner will tend to rule out adverse possession."[140] This approach, which focuses on dramatic upheavals and revolutions against the sovereignty of the owner, should in theory protect the true owner from all "but the most direct and confrontational challenge to her authority."[141]

One final version of this rights-based based justification for adverse possession (and, by extension, prescription) expresses less concern about sovereignty per se and instead relies on a "productive-labor theory" of property derived from Locke.[142] In this theory, the two crucial prerequisites of a property owner's moral claim to property are (1) productive use and (2) claim-marking, the latter of which refers to staking claims to resources and maintaining those claims "in ways that other members of the same community are reasonably likely to understand and respect."[143] While this theory acknowledges two of the traditional justifications for adverse possession (rewarding an adverse possessor's productive use and quieting title to land burdened by stale claims), it contends that the most powerful justification for adverse possession is a negative one—its capacity to "disentitle title owners who violate the two prerequisites of labor."[144] In other words, adverse possession is justified by its role in deterring owners from neglecting to fulfill their moral responsibilities, not just as productive users, but also as claim-markers.[145] Reframed with a positive spin, adverse possession is consistent with a natural rights justification of property because it encourages an owner to speak "clearly and distinctly about [that person]'s claims to property."[146] A failure to speak clearly about

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Katz's view, resembles not so much a land thief, but rather the leader of a "revolution, or more precisely, a bloodless *coup d'etat*." *Id.* at 72.

139. *Id.* at 64.

140. *Id.*

141. *Id.*

142. Claeys, *supra* note 124, at 438.

143. *Id.* at 440. In Claeys's labor theory of property, a property owner's moral claim based on satisfaction of these two prerequisites is subject to override when other considerations come into play, specifically when other persons' life-preservation needs or improvement-related preservation needs are particularly urgent. *Id.* at 442 (describing Locke's necessity and sufficiency "provisos").

144. *Id.* at 453.

145. *Id.* at 453–54.

146. *Id.* at 454 (quoting Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82 (1985)).

one's claims to property can conversely create potential entitlements in others whose possession does unequivocally communicate an intention to make a claim.

The final group of prescriptive easement defenders are the treatise authors. Although two of the more skeptical authors recount the "drawbacks" of prescriptive easements and adverse possession as articulated by other scholars and judges,[147] they nevertheless acknowledge that the doctrines remain "a major force in contemporary real property law" and are "frequently employed to resolve contemporary disputes over land possession and use."[148] Other treatise authors remain quiet defenders of the status quo, at least to the extent they explicate the doctrine without criticizing it heavily.[149]

Although none of these scholars have addressed the particular question of how to frame presumptions of adversity in the context of prescriptive easements, one senses that these scholars might be comfortable with the traditional and presumed majority rule—the PPAU. Because this presumption places a burden on landowners to detect open and notorious use of their land by neighbors and others who act without an express license or lease agreement and then take action to stop this unauthorized use or at least extract license agreements before the statutory period runs[150], the presumption reinforces the notion that landowners have meaningful responsibilities and duties. Landowners, and not confused neighbors, should prevent unwanted improvements from being constructed on their land. Landowners should prevent others from developing reliance interests regarding use of their land. Landowners should act like undisputed sovereigns and communicate their claims to exclusive use through visible markers and easily understood actions and claims.[151]

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147. BRUCE & ELY, *supra* note 16, § 5.1.

148. *Id.* § 5.1.

149. *See, e.g.*, KORNGOLD, *supra* note 16, §§ 3.23–3.34 (devoting almost 40 pages to doctrinal commentary); 4 POWELL, *supra* note 14, § 34.10; 7 THOMPSON, *supra* note 46, § 60.03.

150. A court shifts the burden of proof to the alleged servient estate owner to prove that the claimant's use was permissible at the outset or became permissive prior to the moment when the claimant's use ripened into prescriptive easement. Korngold, *supra* note 16, § 3.29; 4 POWELL, *supra* note 14, § 34.10(2)(c).

151. Of course, the arguments of Katz and Claeys justifying adverse possession on the grounds of encouraging active agenda-setting and claim-marking could also justify the opposite adversity presumption—a pure presumption of permissive use—on the ground that the law should require long-term users to plainly assert their own sovereignty and claims to property as productive users. *See generally* Katz, *supra* note 124, at 50; Claeys, *supra* note 124, at 438. However, since both theorists

B. Abolitionists

In stark contrast to the defenders of prescription and adverse possession doctrine, several authors have argued in recent years that the entire doctrine of prescription should be abolished in American law, at least in the typical case of a claimant who does not rely on a written, but perhaps defective, grant or reservation of easement.[152] The theoretical character of the abolitionists' arguments, which partially mirror those of the defenders described above and the reformers described below, varies widely. Some sound in moral theory; others strike utilitarian chords. Others worry more about jurisprudential and doctrinal harmony.

The most common moral argument in favor of abolition of prescription focuses on the case of a bad faith claimant who lacks any written grant or reservation of an easement.[153] Awarding such a claimant with a prescriptive easement, the abolitionists contend, rewards trespass and gives the claimant a valuable property right in another's land without ever having to pay for it.[154] Prescription, therefore, resembles the kind of demoralizing, uncompensated "coerced transfer," which the law generally punishes.[155] These arguments about unfairly rewarding trespass occasionally find their way into judicial commentary on prescriptive easements,[156] and have been echoed in many law review articles criticizing adverse possession.[157]

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seem to emphasize an owner's responsibility for controlling the use of her property as a guiding principle of property law, I interpret their positions as leaning in favor of the PPAU.

152. *See generally* Hernandez, *supra* note 16; Cunningham, *supra* note 122; Ackerman & Johnson, *supra* note 122.

153. *See generally*, Hoops, *supra* note 128.

154. Hernandez, *supra* note 16, at 106–08; Morgan, *supra* note 122, at 1259, 1265; Cunningham, *supra* note 122, at 898.

155. Merrill, *supra* note 124, at 1134. Coerced transfers, Merrill notes, "are socially undesirable because they undermine incentives for productive activity, stimulate excessive precautionary measures, and generally destroy the fabric of human relations." *Id.* Thus, before an adverse possession or prescription statute of limitation runs, Merrill also observes, coerced transfers such as trespass or theft are felonies punishable by imprisonment. *Id.*

156. *See* Melendez v. Holling, 927 N.W.2d 834, 840 (Neb. Ct. App. 2019); Feloney v. Baye, 815 N.W.2d 160, 165 (Neb. 2012); O'Dell v. Stegall, 703 S.E.2d 561, 570 (W.Va. 2010).

157. *See e.g.,* Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 585 (2010) (contending that adverse possession should be abrogated on fairness and efficiency grounds); *see generally* Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. (forthcoming 2021) (arguing that adverse possession is unjustified morally and only survives in the U.S. because it props up the title insurance industry, an industry that has used its monopoly power and political muscle to stifle reforms such as

Abolitionist scholars also criticize prescription by challenging the reliance interest argument commonly advocated by its defenders.[158] A person who engages in long-term use of another person's land without obtaining an easement should not expect that this use will be confirmed in land records merely because of the longevity of the use.[159] In essence, these critics contend that unless the law recognizes reliance interests in this context, people cannot legitimately claim reliance.[160] In short, reliance interests are not generated autonomously. They depend on the law for their foundation. People who use another's land without permission or without obtaining a property right cannot legitimately expect that use to continue indefinitely.[161] Some abolitionists acknowledge that long-term users might have legitimate reliance interests when they rely on a defective written grant or oral promise of a right to use land, but they contend that these interests are adequately addressed through other property or contract law doctrines, including recognition of an easement by estoppel, detrimental reliance, or reformation and supplementation of agreements.[162] These two strands of abolitionist argument might best be characterized as variations on the general theme of reliance-interest skepticism.

Another bucket of abolitionist argument is more utilitarian in nature. Some abolitionists argue that, just like adverse possession more generally, prescription creates uncertainty about title and property rights and undermines the utility and reliability of land registration systems.[163] In essence, these arguments assert that the well-known and commonly praised title-curing function of prescription and adverse possession doctrine is either exaggerated or misleading because the two doctrines create as many clouds on title as they

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Torrens-style land registry systems that would make adverse possession unnecessary, particularly given that most adverse possession cases do not involve squatters or usurpers, but rather boundary disputes).

158. *See e.g., id.* (manuscript at 11); Hernandez, *supra* note 16, at 105.

159. Hernandez, *supra* note 16, at 105, 108 (arguing that if a user cannot satisfy elements for establishment of an easement by estoppel, "the user has no reasonable basis to claim a permanent property interest" and that if the law of prescription did not exist, no purchaser or creditor could ever justifiably rely on the mere appearance of use over the chain of recorded title); Cunningham, *supra* note 122, at 903 ("Given modern recording statutes, prescription disputes ought to be grounded in who has title rather than an expectation of possession due to continuous trespass.").

160. *See* Hernandez, *supra* note 16, at 105, 108; Cunningham, *supra* note 122, at 903.

161. Cunningham, *supra* note 122, at 903–04 (criticizing Holmes' reliance/personhood theory and suggesting that Holmes' justification "leapfrogs basic fairness"); *see also* Hoops, *supra* note 129, at 200–02 (analyzing the personhood justification both in the form articulated by Radin's personhood theory and Alexander's human flourishing theory).

162. Hernandez, *supra* note 16, at 105.

163. *Id.* at 107–08; Morgan, *supra* note 122, at 1265; Cunningham, *supra* note 122, at 902.

cure.[164] Prescription, in particular, raises transaction costs for users of land registration systems and real estate market participants because potential purchasers and lenders must spend more time and money identifying evidence of a prescriptive easement through surveys or pay more for title insurance to minimize the risk of recognition of a prescriptive easement burdening a parcel.[165]

This argument about undermining land records and destabilizing the marketplace is often combined with other utilitarian arguments related to the social cost of prescriptive easements.[166] Repeating dicta from judges, some abolitionists argue that the existence of prescription, and in particular the existence of a generous presumption of adversity, is wasteful because it leads landowners to spend too much time and money monitoring and policing property.[167] Relatedly, abolitionists also argue that prescription and generous presumptions of adversity are socially destructive because they discourage landowners from engaging in neighborly acts of accommodation.[168] Interestingly, this last argument that prescription discourages neighborliness

164. Cunningham, *supra* note 122, at 902 (arguing that "prescription foments uncertainty" and that courts use the doctrine to "subvert the laudable goals of recording statutes" and that the doctrine "destabilizes real estate transactions by undermining title certainty for buyers and creditors who justifiably rely on recording statutes"); Ackerman & Johnson, *supra* note 122, at 95 ("The nature of prescriptive easements and adverse possession creates an atmosphere of uncertainty for landowners.").

165. Hernandez, *supra* note 16, at 108 (criticizing title curing argument in favor of prescription as "circular" because if prescription was not recognized by law, purchasers and creditors would not have to worry about unrecorded interests); Ackerman & Johnson, *supra* note 122, at 97 (arguing that recording acts and marketable title statutes do a better job of stabilizing land titles and uses and that prescription and adverse possession create uncertainty); *see also* Hoops, *supra* note 129, at 191–93 (voicing concerns about the traditional legal certainty justification for adverse possession and acquisitive prescription in light of increasing reliability of public land records and registries and suggesting that these doctrines may cause uncertainties of their own and thus there is "widening theoretical vacuum" that must be filled with other justifications).

166. *See generally*, *infra* notes 167–70.

167. Merrill, *supra* note 124, at 1134; Cunningham, *supra* note 122, at 901 (arguing that "it is circular to suggest that prescription is justified by landowner diligence merely because landowner diligence protects against prescription"); Morgan, *supra* note, 122, at 1265 (noting that existence of prescription can increase monitoring costs); Hoops, *supra* note 129, at 194–97 (raising doubts about the failure to monitor and control the use of land rationale).

168. Hernandez, *supra* note 16, at 108–09; Cunningham, *supra* note 122, at 905 ("prescriptive easements provoke litigation and neighborhood conflict"); Morgan, *supra* note 122, at 1265 (arguing that prescription "can discourage neighborly conduct because landowners will have to formalize permissive arrangements or prevent neighbors from using any part of their land to avoid the risk of the neighbor acquiring permanent property rights") (citing RESTATEMENT (THIRD) OF PROPERTY § 2.17 cmt. c (AM. L. INST. 2000)); Ackerman & Johnson, *supra* note 122, at 94.

and turns landowners into mean and selfish land hoarders is often unsupported by any social science evidence.[169]

One final niche argument in favor of abolishing prescription builds on a well-known argument against adverse possession more generally. This argument holds that prescription and adverse possession both overvalue development of vacant or wild land and thus encourage the destruction of wilderness, thus undermining long-term conservation interests in preserving undeveloped land.[170] This argument responds to the commonplace justification for adverse possession and prescription grounded in the idea that both doctrines simultaneously discourage landowners from sleeping on their rights and reward industrious use, development, and active monitoring of land.[171] This conservationist argument against prescriptive easements and adverse possession has both moral and utilitarian dimensions.[172]

Interestingly, few abolitionists worry much about one of the most common justifications for adverse possession: the notion that a landowner's right to bring a trespass claim will at some point simply become stale and should, therefore, in the interests of certainty and repose, be subject to a statute of limitation.[173] One abolitionist acknowledges this traditional justification for adverse possession but forthrightly asserts that a landowner's right to terminate trespass

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169. *See, e.g.*, Hernandez, *supra* note 16, at 109 (claiming, without any supporting evidence, that "[i]n many, if not most, prescriptive easement cases, the property owner's failure to object to the continued use may reflect a desire to be friendly, to avoid needless confrontation, or that the prescriptive use may not have precluded or significantly interfered with the owner's enjoyment of the property"); Ackerman & Johnson, supra note 122, at 98 (suggesting that prescription and adverse possession "cause friction between people" with minimal authority).

170. Cunningham, *supra* note 122, at 871, 901, 921 (criticizing traditional justification of adverse possession and prescription as means of promoting landowner diligence by noting that an "absentee owner alters little, if anything," and arguing for universalizing "wild lands" presumption that use of another's land is permissive and not adverse); Ackerman & Johnson, *supra* note 122, at 96 (policy arguments in favor of prescription and adverse possession based on favoring active use are "in direct opposition to conservation").

171. For a recent account of both the utilitarian and moral versions of the sleeping/earning justification for adverse possession and prescription and a critique of the legal certainty argument, see Hoops, *supra* note 129, at 189–200. Hoops eventually concludes, however, that labor theories, personhood theories, human flourishing theories and even law and economics theories can still justify acquisitive prescription despite the increase in legal uncertainty resulting from the doctrine. *Id.* at 200–05.

172. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 862–64 (1994); *see generally* John G. Sprankling, *The Anti-Wilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996); *see infra* notes 313–16 and accompanying text.

173. Hernandez, *supra* note 16, at 109.

should never be subject to a statute of limitations defense in the context of prescriptive easements.[174]

The primary lesson to be drawn from the work of the abolitionists relevant to the framing of presumptions of adversity and permissiveness may be that a pure presumption of permissiveness friendly to record owners is normatively superior to a pure presumption of adversity friendly to claimants. Thus, one can safely assume that most abolitionists would favor broad adoption of the PPPU. If this transformation in the law were to take place, every prescription easement claimant would then have to present actual evidence that the claimant or predecessor's use began without the permission of and not in subordination to the rights of the landowner and continued to be adverse for the entire statutory period, even if that use might have begun many years earlier.

C. Reformers

The final group of prescriptive easement and adverse possession commentators endorse some of the abolitionists' arguments. However, either because they may be reluctant to overturn long-standing common law doctrines or because they are more receptive to certain traditional justifications for the doctrines, these scholars advocate for reform of prescription and adverse possession, rather than wholesale abolition.[175]

In his role as associate reporter, one reformer, Professor Thomas Merrill, will have a significant influence on the Restatement Fourth sections addressing prescriptive easements. Building on opinions rendered in a famous California prescriptive easement case, *Warsaw v. Chicago Metallic Ceilings, Inc.*,[176] Merrill has argued famously that an adverse possession claimant (and thus presumably a prescriptive easement claimant) who makes out a prima facie case should be required to pay just compensation to the losing record owner if the record owner (1) brings a timely action for indemnification and (2) proves the claimant's possession began in bad faith.[177] Although Merrill's entire article merits careful study, three points are especially relevant to this Article's concern with presumptions of adversity.

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174. *Id.*

175. *See e.g.*, Fennell, *supra* note 124; Stake, *supra* note 124, at 2420.

176. *See generally* 676 P.2d 584 (Cal. 1984).

177. Merrill, *supra* note 124, at 1125. Merrill reviews the relevant judicial opinions in *Warsaw* in his article. *Id.* at 1124–25 n.12–13.

First, summing up the four traditional rationales for adverse possession and their limitations in light of the actual doctrine,[178] Merrill defends the common law doctrines of adverse possession and prescription "as a testament to the desirability of mechanical rules."[179] Putting aside the apparent tendency of some judges to punish bad faith possessors by manipulating or subverting certain doctrinal elements as Richard Helmholz claimed to have revealed,[180] Merrill himself observes that:

> [A]ll in all, the law of adverse possession appears on its face to constitute a rather remarkable achievement: a doctrine that serves a number of distinct yet complimentary functions and does so under a decisional rule which is sufficiently mechanical that it will not unduly interfere with a functioning market in property rights.[181]

This is a crucial point that many subsequent prescription and adverse possession critics may have overlooked in their zeal to eliminate judicial regulation of non-consensual long-term possession and use of land and replace it with a Torrens system in which property rights are only given effect if they are recorded and documented in a public land registry.[182]

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178. Merrill identified the following four justifications for adverse possession:

> (1) the difficulty of proving stale claims and concerns about stale evidence;
>
> (2) the law's interest in quieting titles, and in particular, its interest in curing easily missed conveyancing mistakes;
>
> (3) the law's interest in punishing record owners who sleep on their rights, which, Merrill acknowledged, is closely linked with the correlative interest in encouraging landowners to use, develop, or at least actively monitor their property; and
>
> (4) the law's interest in honoring and protecting possessors' reliance interests, a justification, which Merrill observed, tends to come in one of three flavors—one emphasizing preservation of social peace, a second drawing on personality theories of property rights, and a third focusing on sunk costs and quasi-rents.

Id. at 1128–31.

179. *Id.* at 1142.

180. R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L. Q. 331, 358 (1983). For a detailed analysis of that article and the fierce rebuttal offered by Richard Cunningham, see Lovett, *supra* note 53, at 43–61.

181. Merrill, *supra* note 124, at 1143.

182. *See, e.g.*, Shoked, *supra* note 157 (manuscript at 20–21); Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J. L. & ECON. 709, 710–11 (2005) (arguing that registration systems are more efficient than recording systems taking into account other costs such as title insurance and privacy). It is true that the United States has never adopted the Torrens system on a wide scale, perhaps because it would require a significant investment in government funds to establish and maintain or perhaps because in states where it has been tried courts and statutes have

Second, in response to the common argument that modern recording systems, modern surveying techniques, and title insurance practices have undermined the classic "quieting title" rationale for adverse possession,[183] Merrill argues that this justification still deserves respect because adverse possession restrains title insurance costs to the extent it prevents older, never extinguished claims from rising up indefinitely and increasing risk for title insurers.[184] Indeed, for Merrill one of the benefits that adverse possession brings through its capacity to extinguish older claims is that it reduces the "drag" on real estate markets that increased title insurance costs and litigation concerning old claims would create while imposing relatively modest "demoralization costs" on the holders of older claims.[185] In other words, although he acknowledges that adverse possession results in an uncompensated taking, Merrill justifies the taking as a matter of aggregate social welfare because the increase in title certainty produced by the doctrine outweighs any demoralization experienced by record owners who sleep on their rights.[186]

Merrill's third insight addresses Richard Helmholz's findings of judicial discomfort with adverse possession claimants who possess in bad faith.[187] Without assessing the descriptive accuracy of Helmholz's findings, Merrill explains them by alluding to an interest that competes with the traditional justifications for adverse possession—the law's interest in punishing or

recognized numerous exceptions. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 5, Div. IV, Ch. 2, § 2.1, reporter's note, at 89–90 (AM. L. INST., Preliminary Draft No. 7, Sept. 3, 2020); Shoked, *supra* note 157 (manuscript at 27–28) (acknowledging high start-up costs and other transitional challenges in establishing a Torrens system). In contrast, the current real estate title clearance system places its primary operational costs on the primary users of that system—real estate market participants. Secondarily, adverse possession and prescription place title clearing costs on record owners who may have been passive and insufficiently attentive to their property and on possessors/users who, except in the case of good faith claimants, likely engaged in some high risk behavior by possessing or using land without clear evidence of title. In this sense, as a matter of allocative justice, the current system is not wholly irrational or unfair. Shoked, however, claims that the uncertainty created by adverse possession translates into higher title insurance premiums, whereas Merrill claims adverse possession lowers title insurance costs. *Compare* Shoked, *supra* note 157 (manuscript at 31, 39), *with* Merrill, *supra* note 124, at 1129.

183. *See, e.g.*, CHARLES C. CALLAHAN, ADVERSE POSSESSION 99–105 (1961); Lovett, *supra* note 53, at 39–42.

184. Merrill, *supra* note 124, at 1129. Some recent scholarship challenges this claim by arguing that the United States should either adopt a Torrens land registration system or more strictly regulate the title insurance industry by focusing on its monopoly power. Shoked, *supra* note 157 (manuscript at 41).

185. Merrill, *supra* note 124, at 1129–30.

186. *Id.*

187. Hemholz, *supra* note 180, at 332, 357–58.

deterring "coercive transfers."[188] Drawing on Helmholz, Merrill suggests that judges must intuitively recognize that "the intentional dispossessor is clearly more culpable or blameworthy" than a good faith dispossessor.[189] So, despite his earlier apology for adverse possession in aggregate welfare terms, recognition of this interest leads Merrill to offer his liability-rule reform model: an indemnification action available to a true owner divested of title by an adverse possession or prescriptive easement claimant whenever the true owner proves that the claimant's period of possession began in bad faith.[190]

Viewed from the perspective of the challenge posed to the Restatement Fourth reporters by restating the law of prescriptive easements, Merrill's first two insights—about the relatively mechanical nature of adverse possession and prescription's doctrinal rules and their still efficient title clearing capacity—are probably the most important. His third argument—that the law's interest in discouraging coerced transfers should be met with a liability rule indemnification process—seems to have already been internalized in the Restatement Fourth's tentative proposal to address concerns about bad faith adverse possessors through restitution and equitable doctrines such as constructive fraud, constructive trust, equitable liens, and "balancing of the equities," all doctrines that lie outside the formal scope of property law proper and would not affect the state of title determined by adverse possession.[191]

Curiously, several prescriptive easement commentators echo Merrill's liability rule reform proposal for bad faith adverse possessors without acknowledging his praise for the doctrine's relatively mechanical decisional rules and their tendency to reduce real estate transaction costs.[192] A student commentator working under the supervision of Tanya Marsh, another Restatement Fourth associate reporter, more recently offered a variation of Merrill's liability-rule proposal,[193] arguing that prescriptive easement claimants should be required either to "(1) establish reasonable necessity for an easement

188. Merrill, *supra* note 124, at 1134.

189. *Id.* at 1135.

190. *Id.* at 1145–53.

191. RESTATEMENT (FOURTH) OF PROPERTY Vol. 1, Div. II, Ch. 2 § 2.3 cmts. a–f, reporter's note, at 18–23 (AM. L. INST., Preliminary Draft) (on file with author).

192. Hernandez, *supra* note 16, at 110–11. Interestingly, Hernandez does not credit Merrill for his compensation proposal, but rather the *Warsaw* opinions and a student author who wrote a comment about the *Warsaw* decision. Darryl S. Cordle, Note, Warsaw v. Chicago Metallic Ceilings, Inc.*: Compensation for Prescriptive Easements*, 19 LOY. L.A. L. REV. 111, 129–31 (1985) (recommending awarding compensation for prescriptive easements only after a balancing of the equities analysis).

193. Morgan, *supra* note 122, at 1267.

over the servient estate, or (2) compensate the servient estate's owner in order to receive a prescriptive easement."[194]

The views of another adverse possession-prescription reformer, Jeffrey Stake, deserve mention because his article, *The Uneasy Case for Adverse Possession*, has influenced many other scholars.[195] Although he exposes the weaknesses of many common justifications for adverse possession, Stake ultimately endorses an endowment effect and loss aversion justification and does so innovatively by updating the traditional personhood and will theories of adverse possession with evidence from experimental psychology.[196] Readers of this Article, however, should note that Stake's exploration of adverse possession appears to have been sparked by his own experience with a road that had been mistakenly constructed on his property and his own concern that two neighbors' use of the road could ripen into a prescriptive easement if unchallenged.[197] Indeed, after Stake offered these two neighbors a free license to use the road, one neighbor accepted the offer, thus classifying his use as permissive and eliminating Stake's worries.[198] The other neighbor, however, refused the offer, leading Stake to consider the necessity of suing that neighbor and to speculate that prescription "strains neighborly relations" and can actually impede efficient land use arrangements.[199]

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194. *Id.* at 1267. Morgan primarily argues that a bad faith prescriptive easement claimant who cannot establish reasonable necessity for the easement should be subject to a compensation requirement to prevent unjust enrichment. *Id.* at 1270. Building on a famous law and economics argument justifying adverse possession, Morgan argues that allowing a long-term user who satisfies the requirements for a prescriptive easement to keep the easement if he compensates the landowner for the fair market value of the easement would "prevent[] unfair loss to a claimant who has spent money to improve the condition of an easement." *Id.* (relying on Miceli & Sirmans, *supra* note 124). Morgan also notes the disharmony in U.S. law regarding presumptions of adversity and permissiveness and argues that the Restatement Fourth should attempt to inspire statutory reform by adopting a uniform presumption of permissive use in all cases, thus shifting the burden of proof to a prescriptive easement claimant to prove that his or her or its use was actually adverse and non-consensual. *Id.* at 1255. Though he notes the inconsistent presumptions used by various courts. *Id.* at 1259–60. Morgan does explain why he favors a uniform "permissive use" presumption except to note that some courts who use it state that prescriptive easements should be disfavored because they represent uncompensated transfers of property rights. *Id.* at 1259.

195. Stake, *supra* note 124, at 2420. Scholars influenced by Stake include Lee Anne Fennell and Nadav Shoked. *See generally* Fennell, *supra* note 124, *passim*; Shoked, *supra* note 157, *passim.*

196. *See generally* Stake, *supra* note 157, at 2434–73.

197. *Id.* at 2432–33.

198. *Id.* at 2433.

199. *Id.*

In light of this experience, it may not be surprising that Stake's primary recommendations for reform of the law focuses on notice and tolling of prescription and adverse possession claims.[200] In particular, he recommends that statutes of limitation applicable to adverse possession and prescription could provide for tolling when a record owner notifies an adverse possessor "that he does not mind AP's current use, but wants to preserve his right to bring an action in ejectment in the future."[201] Furthermore, Stake acknowledges that an adverse possessor (or a prescriptive easement claimant) should be allowed to express dissatisfaction with the record owner's claim of right by serving notice of the adverse possession (or prescription) claim and thus preventing the record owner's notice from tolling the statute.[202] In essence, Stake wants the law to demarcate more clearly whether a neighbor's use is permissive or adverse. His proposed reform thus seems to assume that open and notorious use of a person's land by a neighbor is presumptively *adverse*, but he would give an owner who notices such use an easy way of reversing that presumption by notifying the user that the continued use is permissive.[203] Finally, Stake would then allow the user to rebut the second order presumption with a clear notice of adverse intent.[204] Although he does not specify exactly how these notices and counter-notices would work, Stake's recommendation for legally effective mechanisms that would allow parties to signal their intentions regarding adversity prefigures the next important reformist contribution to the adverse possession literature, and to some degree, the Restatement Fourth's tentative interest in the role of disclaimer in adverse possession doctrine.[205]

Like Thomas Merrill, Lee Anne Fennell focuses on bad faith adverse possessors, but rather than subject them to a liability rule regime, she proposes to limit the title-shifting benefits of adverse possession to these possessors, persons she calls "knowing trespassers."[206] Fennell believes that adverse possession (and presumably prescription) must be appreciated in the context of

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. RESTATEMENT (FOURTH) OF PROPERTY Vol. 1, Div. II, Ch. 2, § 2.5, at 33 (AM. L. INST., Preliminary Draft) (on file with author).

206. Fennell, *supra* note 124, at 1043.

property law's broader doctrinal infrastructure.[207] Viewed in this light, adverse possession serves a "niche" purpose of transferring title from owners who value their land very little to knowing trespassers who value the same land much more when market transactions are impossible or extremely difficult to achieve.[208] Adverse possession, Fennell argues, should be modified to discourage "inefficient trespass" and encourage only "very efficient trespass."[209] To accomplish this purpose, Fennell would revise adverse possession so that only a bad faith possessor could gain title to land after the statute of limitations has run.[210] Moreover, such possessors should be required to document their intent to acquire ownership either by offering to purchase the land or by registering notice of their bad faith intent in public land records.[211] These reforms, Fennell suggests, would lead to greater predictability and a more mechanical application of the doctrine.[212]

In both Stake and Fennell's ideal property world, all parties with an interest in land would reveal their valuations and intentions publicly and these acts of

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207. *Id.* at 1063, 1066, 1083–84 (referring to trespass, equitable doctrines addressing mistaken improvements, marketable title acts, title insurance, contract of sale warranties, and recording acts as forming this broader doctrinal infrastructure and suggesting these can perform many of the title clearing and equitable tasks associated with adverse possession).

208. *Id.* at 1040.

209. *Id.* at 1066–69.

210. *Id.* at 1041.

211. *Id.* at 1075–76 (making detailed argument for purchase offer or registered notice requirement). Fennell acknowledges that her efficient trespass thesis depends on two assumptions that are "debatable," but which to her seem "plausible": (1) "the likelihood that that the record owner will interrupt the trespass correlates positively with the record owner's valuation of the property" and (2) "the trespasser's willingness to take on the risk of getting caught correlates positively with the trespasser's valuation." *Id.* at 1074–75. Of course, it is hard to know definitely whether these assumptions are more or less plausible in the context of prescription claims. On one hand, the stakes of losing a prescription dispute are usually somewhat less grave for the record owner than would be the case in adverse possession because, after all, the record owner will still retain title to the land in dispute, the prescriptive easement can disappear through non-user and can more easily be moved, and finally the record owner usually can still use the road or right of way at issue for purposes consistent with the easement. On the other hand, the claimant's valuation in a prescription case will often be quite high (higher perhaps than in in an adverse possession case) because the claimed easement will often provide the only or a crucial means of access to the alleged dominant estate. Therefore, in the context of prescription, Fennell's second assumption may be stronger than her first one.

212. Fennell apparently disagrees with Merrill's claim that adverse possession can deliver repose and quiet titles efficiently. In her view, adverse possession is "a stunningly weak vessel for delivering repose," primarily because many of the key elements in an adverse possession claim are "open-textured and subject to judicial interpretation" and because of judges' tendency to "take state of mind implicitly into account" thus undermining "whatever benefits of simplicity and administrability an objective standard might be thought to foster." *Id.* at 1062.

communication and publication would promote wealth-maximizing transactions in which negotiation, investigation, and contracting would clarify clouds on title and the vagaries of boundaries.[213] Stake and Fennell's interest in forcing adverse possession and prescriptive easement claimants to communicate their intentions more clearly and openly anticipates arguments in favor of a PPPU for prescriptive easement law and the Restatement Fourth's planned emphasis on the concept of disclaimer.[214]

One more prominent reformer, Rashmi Dyal-Chand, proposes to reshape adverse possession law using an "interest-outcome" approach that would focus much less on determining which party is entitled to the all-or-nothing prize of fee-simple ownership, with its potential to exclude and impose harsh externalities on non-owners, but rather on sharing-based remedies in which all parties' legitimate interests might be accounted for and respected proportionately.[215] At the core of Dyal-Chand's sharing-based remedial structure is a three-step inquiry that she would have courts perform whenever they are confronted with a challenging property dispute.[216] In step one, courts would "recognize and define the legitimate interests of both sides of a dispute."[217] In step two, courts would "consider outcomes that could best accommodate each party's legitimate interests."[218] In step three, courts would bring formal title and entitlements "back into the picture" and "consider the extent to which they are relevant" to the dispute at hand.[219] This "interest-outcome" approach would produce many benefits, Dyal-Chand claims.[220] It would help parties see the potential for more wealth-optimizing "trades."[221] It would encourage courts to recognize the legitimacy of "use and possession" in addition to formal title and thus lead courts to acknowledge parties' needs rather than focus exclusively on their rights.[222] Finally, it would reinforce and validate judges' palpable instincts to resolve difficult property cases by promoting compromise and sharing-based solutions, even though such solutions may

213. *See supra* notes 207–10.

214. RESTATEMENT (FOURTH) PROPERTY Vol I, Div. II, Cha. 2, § 2.5, at 33 (AM. L. INST., Preliminary Draft, on file with author).

215. Dyal-Chand, *supra* note 79, at 676.

216. *Id.* at 677.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 678.

221. *Id.*

222. *Id.*

sacrifice some clarity at the expense of intermediate muddiness.[223] Admittedly, few courts handling current prescriptive easement disputes might explicitly choose to cast their analyses in terms of Dyal-Chand's "interest-outcome" approach or would be prepared to embrace all of its complex and indeterminate elements.[224] Nonetheless, the actual practices of many courts, particularly those that employ variations of the third most popular approach to framing the problem of adverse versus permissive use, the PAUSE approach, suggests that courts do often lean toward a relational, contextual analysis in prescriptive easement cases.[225]

What can the Restatement Fourth reporters learn from all of this impressive reformist scholarship that will help them restate the law of prescriptive easements? First, as Merrill advised more than thirty years ago, the Restatement Fourth reporters should not underestimate the importance of the relatively mechanical rules already embedded in the traditional doctrines of adverse possession and prescription.[226] Although there will always be some room for contextual judgment when courts apply elements such as "open and notorious use" and distinguish between "adverse" and "permissive" use, courts have long experience with this work and can continue that work without having to break totally new ground.[227] Second, as Stake suggests, there is a case to be made for starting with a robust presumption of adversity but then allowing record owners a simple, cost-effective, on-off mechanism for reversing the presumption of adversity and establishing a presumption of permissive use

223. *Id.* at 679. Dyal-Chand also offers a more detailed exposition of the theoretical implications of her interest-outcome approach in terms of the debate over the bundle of rights conception of property and debates about the costs and benefits of more indeterminate property entitlements and rights. *Id.* at 680–83. She also provides a discussion of cases that support her claim that judges already lean toward her proposed "interest-outcome" approach in a wide variety of doctrinal categories, even though they may not use this terminology. *Id.* at 683–99. Finally, Dyal-Chand explains how her three-step model works, using frameworks developed by Oliver W. Holmes and insights from the Progressive Property movement. *Id.* at 700–15. Of particular interest here, Dyal-Chand would have a court engage a complex set of sub-questions when it seeks to determine the legitimate interests of the parties at the outset of the interest-income approach. Those inquiries include not just whether a party has a formal title or property entitlement, but also: (1) what are the parties doing with the property; (2) how the rest of the world perceives such uses; and (3) what are the parties' intentions with respect to those uses. *Id.* at 706–07. Judicial consideration of all of these factors, Dyal-Chand predicts, will expand the universe of possible sharing-based remedial solutions and trades. *Id.* at 709–12.

224. For an explanation of the "interest-outcome" approach, see *id.* at 677.

225. *See generally infra* Part IV.C.

226. Merrill, *supra* note 124, at 1142–43.

227. *See generally infra* Part. IV.

when the record owner notices the potentially adverse use.[228] Third, as Fennell argues, it might be possible to enhance the predictability and efficiency of adverse possession and prescription doctrine by disallowing good faith claims entirely and requiring bad faith claimants to document their intentions and communicate them to record owners.[229] Finally, as Dyal-Chand recommends, we should encourage courts to focus on disputing neighbors' actual, long-term interests and consider more flexible, sharing solutions rather than zero-sum outcomes in which only one party obtains title and exclusion rights.[230]

One final point made by several of the prominent reformers (particularly Stake and Fennell), and perhaps one that some abolitionists would endorse as well, concerns the indeterminacy and open-textured nature of the key elements in adverse possession and prescription, at least when compared to the kinds of inquiries that would be required to deduce ownership rights and easements purely from the title-transfer documents and court judgments recorded in land records.[231] Because indeterminacy can lead to more litigation, these scholars' reform proposals move in the direction of reducing the scope for open-textured standards and establishing more sharp-edged, crystalline rules based on providing written notice and/or recordation of relevant intentions.[232] Of course Merrill and Dyal-Chand seem less afraid of the potentially indeterminate, open-textured quality of adverse possession and prescription doctrine.[233] Ironically,

228. Stake, *supra* note 124, at 2433.

229. Fennell, *supra* note 124, at 1041, 1075–76.

230. Dyal-Chand, *supra* note 79, at 677–79.

231. Stake, *supra* note 124, at 2439 (noting that "[c]ompared with the rules of title transfer . . . the elements of adverse possession are indeterminate" and that adverse possession "trades a search for a few specific behaviors over a long period of time for a wider inquiry into fuzzier actions and thoughts over a shorter period of time"); Fennell, *supra* note 124, at 1062 (criticizing adverse possession on ground that it undermines repose, and presumably leads to more uncertainty and litigation, because each of the elements is "open textured and subject to judicial interpretation").

232. Stake, *supra* note 124, at 2433 (setting forth statute of limitation tolling proposals keyed to notice of permission and countervailing claims of right or title); Fennell, *supra* note 124, at 1041, 1073–76 (setting forth documented purchase offer and registration of bad faith intent proposals). At least one prominent property scholar, however, has observed that crystalline property rules can sometimes produce chaos and confusion if users systematically ignore those rules for their own selfish ends and the legal system allows that disregard to persist for too long. JOSEPH W. SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSONS OF THE SUBPRIME CRISIS 128–56 (2015) (demonstrating how banking industry undermined property titles in the U.S. through subversion of the MERS system for recording transfers of mortgages). Another points out that superficially crystalline rules can create their own indeterminacy because may well struggle to determine the scope of those rules applicability. Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 94 S. CAL. L. REV. (forthcoming 2021) (manuscript at 109–10).

233. *See generally infra* Part IV.C.

Merrill's proposal might actually increase indeterminacy of the doctrines by increasing the stakes of the good faith versus bad faith state of mind inquiry.[234] Dyal-Chand, likewise, appears undeterred by the potential muddiness of her interest-outcome approach.[235]

We should also not forget the strong endorsement of traditional adverse possession and prescription rules from the defenders of those doctrines.[236] Those scholars' work would surely counsel only minimal structural change in the law of prescription and perhaps would endorse either the PPAU approach to adversity framing, with some tightly circumscribed exceptions like those found in the PAUSE approach.

IV. PRESUMPTIONS OF ADVERSITY AND PERMISSIVENESS IN PRACTICE

A review of U.S. case law regarding the presumptions of adversity in the context of prescriptive easement claims produces some surprising results. Courts use the purported majority approach, the PPAU, or a close variant, in fourteen states.[237] Courts use the purported minority approach, the PPPU, in seven to eight states, although this approach has gained some influential judicial adherents in recent years.[238] In most of the remaining states, courts routinely commence their adversity analyses by recognizing the presumption of adverse use but then apply a specialized exception or counter-presumption.[239] In other words, courts in this large number of states use some form of the PAUSE approach.[240] In a handful of remaining states, the law regarding presumptions of adversity is too muddled to classify.[241]

The following sections present these research findings and illustrate the judicial applications of these presumption frameworks by examining representative cases from each category. These sections also explain how the courts justify their presumptions and analyze the advantages and disadvantages of the various approaches, linking the courts' rationales and discussions to the insights of the scholarly community discussed above and the goals of the Restatement Fourth reporters.

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234. *See generally infra* Part IV.C.
235. *See generally infra* Part IV.C.
236. *See generally supra* Part III.A.
237. *See generally infra* Part IV.A.
238. *See generally infra* Part IV.B.
239. *See generally infra* Part IV.C.
240. *See generally infra* Part IV.C.
241. *See generally infra* Part IV.D.

A. The Pure Presumption of Adverse Use (PPAU)

According to the so-called majority approach, what this Article labels the PPAU, once a claimant establishes evidence that its use of the record owner's land satisfies the other elements of prescription (i.e., that the use was open and notorious, continuous and without interruption for the statutory period, and, where relevant, exclusive), the use, if not otherwise explained, is presumed to have been adverse.[242] Once this inference is in place, a court will shift the burden of proof to the alleged servient estate owner to prove that the claimant's use was permissive at the outset or became permissive prior to the moment when the claimant's use ripened into a prescriptive easement.[243] This Article uses the adjective "Pure" in this context to designate that although this presumption of adverse use may always be rebutted with specific evidence of an implied or express grant of permission, the courts using this approach do not make any threshold attempt to determine the scope of the presumption based on any other generalizable set of circumstances.[244] This characteristic of the PPAU approach thus distinguishes it from the approach used by courts that follow the PAUSE approach discussed in sub-part C below.[245]

Currently, eleven states adhere to this "majority approach" without any apparent qualification or complication, including Arizona,[246] Colorado,[247]

242. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000); SINGER, *supra* note 44, § 5.4; 4 POWELL, *supra* note 14, § 34.10(2)(c); KORNGOLD, *supra* note 16, § 3.29.

243. KORNGOLD, *supra* note 16, § 3.29; 4 POWELL, *supra* note 14, § 34.10(2)(c).

244. *See* cases cited *infra* notes 251–61.

245. *See generally infra* Part IV.C.

246. Harambasic v. Owens, 920 P.2d 39, 41 (Ariz. Ct. App. 1996); United States *ex rel.* Zuni Tribe of N.M. v. Platt, 730 F.Supp. 318, 321 (D. Ariz. 1990); Spaulding v. Pouliot, 181 P.3d 243, 247 (Ariz. Ct. App. 2008).

247. LR Smith Invs., LLC v. Butler, 378 P.3d 743, 747, 749–50 (Colo. App. 2014); Brown v. Faatz, 197 P.3d 245, 250 (Colo. App. 2008); Clinger v. Hartshorn, 89 P.3d 462, 466 (Colo. App. 2003); Weisiger v. Harbour, 62 P.3d 1069, 1072 (Colo. App. 2002); Trueblood v. Pierce, 179 P.2d 671, 677 (Colo. 1947).

Georgia,[248] Indiana,[249] Kentucky,[250] Massachusetts,[251] New Hampshire,[252] Ohio,[253] Pennsylvania,[254] South Carolina,[255] and Virginia.[256] In a few states, judicial formulations of the adversity presumption approximate the PPAU but use slightly different terminology. In Michigan, for instance, courts employ a variation of the PPAU but cast it in terms of a presumption that a claimant's

248. Forsyth Corp. v. Rich's, Inc., 110 S.E.2d 750, 755 (Ga. 1959); *see also* Chancey v. Ga. Power Co., 233 S.E.2d 365, 366 (Ga. 1977) (stating that power company claimant was entitled to presumption that possession was based on "claim of right" and the presumption was strengthened by erection of valuable improvements).

249. Hardin v. McClintic, 125 N.E.3d 643, 652 (Ind. Ct. App. 2019); Celebration Worship Ctr., Inc. v. Tucker, 35 N.E.3d 251, 257 (Ind. 2015); Capps v. Abbot, 897 N.E.2d 984, 988 (Ind. Ct. App. 2008). *But see* Carnahan v. Moriah Prop. Owners Ass'n, 716 N.E.2d 437, 442 (Ind. 1999) (acknowledging rebuttable presumption that unexplained use of a path or road or lands of another for twenty years is adverse but refusing to apply that presumption to recreational use of a body of water and restricting presumption to "obvious path[s] or road for ingress and egress over the lands of another").

250. Ward v. Stewart, 435 S.W.2d 73, 74–75 (Ky. Ct. App. 1968); Finney v. Deweese, 252 S.W.2d 6, 6–7 (Ky. 1952).

251. Denardo v. Stanton, 906 N.E.2d 1024, 1028 (Mass. App. Ct. 2009); Brooks, Gill & Co. v. Landmark Properties, 217 Ltd. P'ship, 503 N.E.2d 983, 985 (Mass. App. Ct. 1987); Flynn v. Korsack, 175 N.E.2d 397, 399 (Mass. 1961); Truc v. Field, 169 N.E. 428, 430 (Mass. 1930); Tucker v. Poch, 73 N.E.2d 595, 597 (Mass. 1947). A recent Appeals Court of Massachusetts decision also recognized the PPAU but rejected the prescriptive easement claim brought by eight "beach users" against an oceanfront landowner on the ground that the use of the beach area was either with the implied permission of owner's predecessor or was insufficiently adverse to put the owner on notice of a claim of right. Houghton v. Johnson, 887 N.E. 2d 1073, 1081–87 (Mass. App. Ct. 2008).

252. Jesurum v. WBTSCC Ltd. P'ship., 151 A.3d 949, 956 (N.H. 2016); Bonardi v. Kazmirchuk, 776 A.2d 1282, 1284 (N.H. 2001); Sandford v. Town of Wolfeboro, 740 A.2d 1019, 1021–22 (N.H. 1999).

253. Andrews v. Passmore, 38 N.E.3d 450, 453 (Ohio Ct. App. 2015); Queen v. Hanna, 985 N.E.2d 929, 941 (Ohio Ct. App. 2012); Roll v. Bacon, 938 N.E.2d 85, 104–05 (Ohio Ct. C.P. of Clermont Cnty. 2010); Gulas v. Tirone, 919 N.E.2d 833, 840 (Ohio Ct. App. 2009) (stating that a "use does not necessarily become permissive simply because the property owner does nothing to prevent it out of indifference, laziness, acquiescence, or 'neighborly accommodation'" and that "[i]t is proof that actual permission was granted that is determinative, and not the descriptive label of 'neighborly accommodation'") (citations omitted).

254. Vill. of Four Seasons Ass'n, v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822 (Pa. Super. Ct. 2014); Gehres v. Falls Twp., 948 A.2d 249, 253 (Pa. Commw. Ct. 2008); Keefer v. Jones, 359 A.2d 735, 739 (Pa. 1976) ("The burden of showing a use began on permissive basis is on the servient owner.").

255. Simmons v. Berkeley Elec. Coop., 797 S.E.2d 387, 390 (S.C. 2016); Kelley v. Snyder, 722 S.E.2d 813, 819 (S.C. Ct. App. 2012); Boyd v. Bellsouth Tel. Tel. Co., 633 S.E.2d 136, 141 (S.C. 2006).

256. Johnson v. DeBusk Farm, Inc., 636 S.E.2d 388, 391 (Va. 2006); Martin v. Moore, 561 S.E.2d 672, 676 (Va. 2002); Ward v. Harper, 360 S.E.2d 179, 181 (Va. 1987).

use originated in a "claim of right," a term which is usually synonymous with hostile or adverse but which in Michigan seems to mean something closer to use under an actual but defective or unrecorded grant.[257] District of Columbia courts also generally recite the PPAU but sometimes note competing presumptions and recognize the possibility or rebuttal based on evidence of implied permission.[258] Mississippi courts apply a two-fold presumption, stating first that "in the absence of proof, the dominant estate is entitled to a presumption of hostility," but adding that where a use of another's land for roadway purposes has been open, visible, continuous and unmolested since some point in time anterior to the memory of the aged inhabitants of the community, such use will be presumed to have originated adversely.[259] Counting these handful of states along with the eleven states where courts more

257. Marlette Auto Wash, LLC v. Van Dyke SC Properties, LLC, 912 N.W.2d 161, 168 (Mich. 2018) (stating that open, notorious, continuous, and adverse use across the land of another for the statutory period "afford[ed] a conclusive presumption of a written grant of such way . . . ." and that "when the passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such use[ ] the burden is on the [alleged servient owner] to show that the use was only permissive") (quoting Wortman v. Stafford, 187 N.W. 326, 328 (Mich. 1922)); Dyer v. Thurston, 188 N.W.2d 633, 634 (Mich. Ct. App. 1971) ("A conclusive presumption arises that the right originated in a grant when the use has continued for many years, as in the instant case, and no proof of whether the claimed prescriptive easement originated in written grant or oral permission is available."). *See also* Widmayer v. Leonard, 373 N.W.2d 538, 543 (Mich. 1985) (clarifying the distinction between burden of producing evidence and ultimate burden of proof once plaintiffs presented evidence that they had used the disputed land for over fifty years, in which case "the burden of producing evidence shifted to defendants to establish that plaintiffs' use was permissive.").

258. Zere v. District of Columbia, 209 A.3d 94, 99–100 (D.C. 2019) (holding that the public acquired prescriptive easement over an alleyway because landowner failed to present evidence of permissive use); Baltic Inv. Co. v. Perkins, 475 F.2d 964, 967 (D.C. Cir. 1973) ("While the burden of establishing a prescriptive easement is quite obviously on he who asserts the interest, where the claimant has made a prima facie showing of the essential elements it is incumbent upon the landowner to introduce contradictory evidence."). *But see* Smith v. Tippett, 569 A.2d 1186, 1190 (D.C. 1990) (noting competing presumptions); Chaconas v. Meyers, 465 A.2d 379, 381–83 (D.C. 1983) (reciting PPAU but finding evidence of implied permission based on neighborly interactions).

259. Paw Paw Island Land Co. v. Issaquena & Warren Ctys. Land Co., 51 So. 3d 916, 924 (Miss. 2010) (quoting McCain v. Turnage*,* 117 So. 2d 454, 455 (Miss 1960)); Knight v. Covington Cty., 27 So. 3d 1163, 1171 (Miss. Ct. App. 2009) (stating the same); Arrechea Fam. Tr. v. Adams, 960 So. 2d 501, 505 (Miss. Ct. App. 2006) (stating the same). *But see* Dethlefs v. Beau Maison Dev. Corp*.,* 511 So. 2d 112, 117 (Miss. 1987) (holding that chancery court judge was entitled to presume that the use of underground drainage pipe was permissive rather than adverse where there was no evidence as to who installed the pipe or when it was installed). In other cases, Mississippi courts stress that a prescriptive easement claimant is not required to prove lack of permission and instead the owner of the putative servient estate is required to prove that the claimant was given permission for use. *Arrechea Fam. Tr.*, 960 So. 2d at 505.

plainly adopt the PPAU, it appears that courts in at least fourteen states follow what has been described as the majority approach in the U.S and what this Article calls the PPAU.[260]

Judicial justifications for the PPAU typically take two forms. Some courts point to a background intuition underlying the law of evidence—namely, the impracticality of requiring a party in a judicial proceeding to prove a negative, which here means that a prescription claimant would have to prove that its or a predecessor's use began without the landowner's permission.[261] This evidentiary problem justifies shifting the burden of proof to the servient estate owner to demonstrate a grant of permission to the claimant or a predecessor.[262] The commonsense observation that a putative servient estate owner will normally be in a better position to marshal relevant evidence of permission, particularly if that person actually owned the property when the alleged adverse use began, further buttresses the evidentiary argument in favor of the PPAU.[263] The other common justification for the PPAU lies in the passage of time itself, as courts sometimes note that when a claimant's use extends well beyond the minimum prescriptive period, the presumption of adverse use is actually strengthened.[264]

To appreciate the power of the PPAU in practice, consider several decisions of the New Hampshire Supreme Court. In a 2016 decision, the court stated its version of the rule in the following terms:

> In assessing the matter of adverse use, we employ a burden-shifting framework. "To establish a *prima facie* case of adverse use, [a claimant] must first produce evidence of acts of such a character that they create an *inference of non-permissive use*." Once the claimant satisfies this initial burden, "the burden of production shifts to the landowner to produce

260. Several states that fall into the third framing category, PAUSE, only offer a narrow exception to the PPAU when a prescriptive easement claim concerns use of land by family members and relatives. Because of the narrow and relatively objective nature of this exception, arguably these states could belong in the PPAU category. However, because this exception is quite distinct and applies to all kinds of easements, it is treated as a branch of the PAUSE approach. *See infra* Section IV.C.i, notes 256–75 and accompanying text.

261. *Arrechea Fam. Tr.*, 960 So. 2d at 505.

262. *Id.*

263. *See generally* Jesurum v. WBTSCC Ltd. P'ship, 151 A.3d 949, 956 (N.H. 2016); Bonardi v. Kazmirchuk, 776 A.2d 1282, 1284–85 (N.H. 2001).

264. Ward v. Stewart, 435 S.W.2d 73, 74–75 (Ky. 1968) (noting that presumption of adverse use is strengthened by long period of time beyond the minimum prescriptive period of fifteen years that use extended).

> evidence to the contrary on the issue of permission or run the risk of the fact finder finding in the claimant's favor." "The burden of persuasion remains at all times on the [claimant]." Whether a use of property is adverse is an issue of fact.[265]

Notice here the distinction between an "inference of non-permissive use," established initially by the claimant's evidence respecting the other elements of a prescriptive easement claim, and the claimant's eventual burden of proof.[266] The claimant's initial "prima facie" evidence leads to a "burden of production" being placed on the alleged servient landowner to bring forth actual, admissible evidence of permission.[267] As the New Hampshire cases reveal, this presumption is quite powerful as it frees the claimant from trying to prove the absence of permission and leads courts away from speculative inquiries into a claimant's subjective intentions.[268]

In *Jesurum v. WBTSCC Ltd. Partnership*, the decision quoted above, the plaintiff, a resident of the coastal town of Rye, sought to establish a public prescriptive easement across a five-foot wide, sandy walking path that passed over a flat, gravel-covered piece of land known as "Sanders Point."[269] The land was owned by a limited partnership and a trust, entities which together operated a private golf course on this and adjacent property.[270] The court concluded that the plaintiff met his initial burden of proof—and thus shifted the burden of proof to the defendants—by demonstrating more than twenty years of continuous use of Sanders Point by the public.[271] That use included parking vehicles and using the path to gain access to a nearby public beach for activities like digging for worms, walking dogs, bird watching, and accessing the Atlantic Ocean for kayaking and canoeing.[272] Although the defendants in *Jesurum* argued that all of this activity was permissive, the New Hampshire Supreme Court disagreed, noting that the public's use was not "incidental" to any other recognized easement holder's use of the alleged servient estate, as had been the case in a previous decision,[273] and rejecting the assertion that allegedly

265. *Jesurum*, 151 A.3d at 956 (citations omitted).
266. *Id.*
267. *Id.*
268. *Id.* at 957.
269. *Id.* at 953.
270. *Id.* at 952–53.
271. *Id.* at 956.
272. *Id.*
273. *Id.* at 956–57 (distinguishing Town of Warren, v. Shortt, 652 A.2d 140 (N.H. 1994)).

"'neighborly' interactions" between members of the public and golf course personnel proved that the public use was permissive.[274]

In *Bonardi v. Kazmirchuk*, the New Hampshire Supreme Court upheld a trial court determination that one property owner acquired a prescriptive easement over an adjoining property owner's driveway.[275] In that case, the court relied solely on the claimant's evidence that for more than thirty years she and her mother used the driveway in question to gain access to her residence, which was located on a parcel lacking access to a public road.[276] In *Bonardi*, the court made no inquiry into the history of the driveway (i.e., who built or maintained it) as in other states that employ specialized exceptions regarding roads.[277] Indeed, the court's sole concern was whether the claimant's use was facially "trespassory, and, therefore, adverse."[278] Even though it acknowledged that the claimant and her mother *might have believed* their use of the driveway occurred with the adjoining landowner's permission, the court nevertheless concluded, fortified by its presumption of adverse use, that "the claimant's '[s]ubjective intent is immaterial; it is the nature of the use that is controlling.'"[279]

Finally, in *Sandford v. Town of Wolfeboro*, the New Hampshire Supreme Court employed the same framework to uphold a town's claim to have acquired a prescriptive easement giving it the right to hold water behind a dam above a certain mean sea level line on lakeshore land owned by a local resident.[280] Once again, the court's application of the PPAU made disputes about the parties' intentions immaterial.[281] Instead, as the court observed, "specific acts of trespassory flowage create an inference that the town's predecessors in title flowed [the landowner's] land . . . as of right for a period of twenty years, and thus, established the town's prima facie case on the adverse use element."[282] Because the landowner failed to substantiate his argument that the flowage above the agreed littoral boundary line was permissive with any relevant

274. *Id.* at 957 (noting that sixty years of open public access, without any evidence of members of the public seeking landowner permission or landowners granting permission, negated "neighborly interactions between golf course employees").

275. 776 A.2d 1282, 1285 (N.H. 2001).

276. *Id.*

277. *See infra* Section IV.C.iii.

278. *Bonardi*, 776 A.2d at 1285.

279. *Id.* (citation omitted).

280. 740 A.2d 1019, 1022–25. (N.H. 1999).

281. *Id.* at 1024.

282. *Id.* at 1023.

documentation or pertinent, admissible and non-conclusory affidavits, the New Hampshire Supreme Court simply affirmed the trial court's summary judgment ruling for the town.[283]

As this review of New Hampshire decisions reveals, the PPAU is a powerful judicial tool. To be sure, sometimes a landowner defendant will succeed in rebutting the presumption by offering strong evidence of a grant of a permission.[284] However, if the Restatement Fourth reporters are seeking a mechanistic rule that produces consistent results for a wide variety of prescriptive easement cases, they need look no further than the New Hampshire Supreme Court's formulations of the PPAU. That court's framework resulted in recognition of prescriptive easements in three quite different contexts: a public easement permitting parking and recreational access over a walking path,[285] an easement permitting joint vehicular access over a driveway on an adjoining property,[286] and a novel flowage easement permitting a town to maintain water levels in a lake at a height desired by the lakeside property owner's association.[287] The court's robust "inference of non-permissive use," without regard to specialized contexts, produced prescriptive easements in all three of these situations, based simply on clear evidence of lengthy and otherwise "trespassory" use.[288] As this review illustrates, consistency and ease of judicial application are certainly virtues that would be served by a straightforward adoption of the PPAU.

B. The Pure Presumption of Permissive Use (PPPU)

Under the PPPU, the continuous unexplained use of another person's land for the statutory period is presumed to have occurred with the landowner's consent, even if the claimant's use is otherwise open and notorious.[289] Under this "pure" presumption, the claimant faces the burden of proving a negative—

283. *Id.* at 1023–24, 1026.

284. Vill. of Four Seasons Ass'n v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822–23 (Pa. Super. Ct. 2014) (holding that village landowner rebutted presumption of adverse use by introducing letter granting ski resort an indulgence to use village's lake for snow making); Maralex Res., Inc. v. Chamberlain, 320 P.3d 399, 404–06 (Colo. App. 2014) (affirming trial court finding that claimant's use of road was permissive, not adverse, citing evidence that claimant and predecessors had been given keys to locked gates on defendant's property, even though, as trial court correctly recognized, the existence of gate does not necessarily establish that use was permissive in all cases).

285. Jesurum v. WBTSCC Ltd. P'ship, 151 A.3d 949, 959 (N.H. 2016).

286. Bonardi v. Kazmirchuk, 776 A.2d 1282, 1285 (N.H. 2001).

287. *Sandford*, 740 A.2d at 1021, 1025.

288. *Jesurum*, 151 A.3d at 956; *Bonardi*, 776 A.2d at 1285; *Sandford*, 740 A.2d at 1021, 1025.

289. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

that the use was not permissive—regardless of the particular context of the prescriptive easement claim and without any additional threshold inquiry into the appropriate scope of the presumption.[290] Courts in seven states generally adhere to the PPPU: Alabama,[291] Alaska,[292] Florida,[293] North Carolina,[294] Rhode Island,[295] West Virginia,[296] and Wyoming,[297] although, as noted below,

290. *Id.*

291. Johnson v. Coshatt, 591 So. 2d 483, 485 (Ala. 1991); Hollis v. Tomlinson, 585 So. 2d 862, 863, (Ala 1991); Carr v. Turner, 575 So. 2d 1066, 1067–68 (Ala. 1991); Bull v. Salsman, 435 So. 2d 27, 29 (Ala. 1983); Fisher v. Higginbotham, 406 So. 2d 888, 889 (Ala. 1981); Cotton v. May, 301 So. 2d 168, 170 (Ala. 1974). In a number of contexts, however, Alabama courts are more solicitous of prescriptive easement claims. *See infra* notes 335–45 and accompanying text, discussing: Belcher v. Belcher, 224, So. 2d 613 (Ala. 1969); *Ex parte* Gilley, 55 So. 3d 242, 246–48 (Ala. 2010); Quinn v. Morgan, 215 So. 2d 1090, 1093–95 (Ala. Civ. App. 2016) (applying *Belcher*); Barker v. Bennet, 227 So. 3d 43, 46–47 (Ala. Civ. App. 2016).

292. Dault v. Shaw, 322 P.3d 84, 93–95 (Alaska 2013); Hamerly v. Denton, 359 P.2d 121, 126 (Alaska 1961). *But see* McDonald v. Harris, 978 P.2d 81, 85 (Alaska 1999) (applying counter-presumption of adverse use for roadways not established by owner of servient estate that provide only means of access to alleged dominant estate); McGill v. Wahl, 839 P.2d 393, 397–98 (Alaska 1992) (stating the same), discussed *infra* note 442 and accompanying text.

293. Okefenoke Rural Elec. Membership Corp. v. Dayspring Health, LLC, 300 So. 3d 371, 372–73 (Fla. Dist. Ct. App. 2020); Conrad v. Young, 10 So. 3d 1154, 1158 (Fla. Dist. Ct. App. 2009); Telesco v. Nooner & Neal Co., 600 So. 2d 1291, 1292 (Fla. Dist. Ct. App. 1992); Dan v. BSJ Realty, LLC, 953 So. 2d 640, 642–43 (Fla. Dist. Ct. App. 2007); Crigger v. Fla. Power Corp., 436 So. 2d 937, 943–44 (Fla. Dist. Ct. App. 1983).

294. Waterway Drive Prop. Owners' Ass'n v. Town of Cedar Point, 737 S.E.2d 126, 135 (N.C. Ct. App. 2012); Vandervort v. McKenzie, 412 S.E.2d 696, 698–99 (N.C. Ct. App. 1992); Johnson v. Stanley, 384 S.E.2d 577, 579 (N.C. Ct. App. 1989); Dickinson v. Pake, 201 S.E.2d 897, 900–01 (N.C. 1974). *But see* Town of Carrboro v. Slack, 820 S.E.2d 527, 535 (N.C. Ct. App. 2018) (noting that North Carolina courts have found that presumption of permissive use "can be rebutted where the claimant shows that she maintained the private roadway, for example by grading or gravelling it, or repeatedly clearing the path to permit travel"), discussed *infra* note 342 and accompanying text.

295. Butterfly Realty v. James Romanella & Sons, Inc., 93 A.3d 1022, 1033 (R.I. 2014); Altieri v. Dolan, 423 A.2d 482, 483 (R.I. 1980).

296. O'Dell v. Stegall, 703 S.E.2d 561, 580–82 (W. Va. 2010).

297. O'Hare v. Hulme, 458 P.3d 1225, 1237 (Wyo. 2020). In *O'Hare*, the Wyoming Supreme Court acknowledged in dicta "some inconsistency" regarding the presumption that should apply to adversity in the context of prescription, but it emphasized that "a presumption of permissive use is appropriate in cases involving claimed prescriptive easements between neighbors," while leaving open the question of what presumption might be applied in other circumstances. *Id.* at 1237 n.8. *See also* Wyo-Ben, Inc. v. Van Fleet, 361 P.3d 852, 861 (Wyo. 2015) ("[Claimants] have a heavy burden to establish adverse use in Wyoming, where prescriptive easements are not favored. In fact, we generally presume that use of a private roadway by a neighbor is permissive. [N]eighborliness and accommodation to the needs of a neighbor are landmarks of our western life-style.") (citations omitted); Weiss v. Pedersen, 933 P.2d 495, 500–01 (Wyo. 1997); Prazma v. Kaehne, 768 P.2d 586, 589 (Wyo. 1989).

the Alabama, Alaska, and North Carolina courts introduce some minor qualifications that appear to limit the scope of the presumption in a few narrow circumstances.[298] Further, in a destabilizing and much criticized opinion, the Louisiana Supreme Court appears to have adopted a form of the PPPU for cases involving acquisitive prescription of predial servitudes, although it limited its holding to the facts before it.[299] Many courts that employ this demanding presumption justify its deployment either by noting that prescriptive easements are disfavored,[300] or by offering hymns to the virtue of encouraging neighborly cooperation.[301]

In a prominent recent decision, the West Virginia Supreme Court of Appeals reversed decades of precedent and adopted the PPPU.[302] The facts in *O'Dell* are complex but boil down to a dispute between two nearby neighbors.[303] One property owner, O'Dell, claimed a prescriptive easement across a gravel lane that extended from a public road to a driveway adjacent to his house.[304] O'Dell's neighbors, the Stegalls, owned an adjacent parcel and also used the gravel lane for access to the public road. Before O'Dell acquired his lot, the building that became his house had served as a German Baptist Church, and members of the church had used the gravel lane regularly to gain access to the church's parking lot.[305] Unlike most prescriptive easement claims in which one party actually owns the alleged servient estate, here the defendants, the Stegalls, did not own the land on which the gravel lane was located but rather claimed an exclusive right to use it based upon on an easement by necessity or easement implied by prior use.[306]

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298. *See infra* notes 335–42.

299. Boudreaux v. Cummings, 167 So. 3d 559, 563 (La. 2015) (reversing long-standing codal presumption that uninterrupted use is presumed to be adverse and holding that "tacit permission is presumed" in circumstances "where 'indulgence' and acts of 'good neighborhood' are present"). *But see* Walker v. S.G.B.C., LLC, 290 So. 3d 700, 706 (La. Ct. App. 2020) (affirming trial court finding of acquisition of a predial servitude under facts similar to *Boudreaux* without any reference to that decision and applying traditional presumption of adverse use in favor of possessor-claimant).

300. *Wyo-Ben, Inc.*, 361 P.3d at 861; *O'Dell*, 703 S.E.2d at 570.

301. *Wyo-Ben, Inc.*, 361 P.3d at 861 ("[N]eighborliness and accommodation to the needs of a neighbor are landmarks of our western life-style."); *O'Dell*, 703 S.E.2d at 570.

302. *See O'Dell,* 703 S.E.2d at 586.

303. *Id.* at 570–71.

304. *Id.* at 571.

305. *Id.* at 572.

306. This succinct summary is based on the court's lengthy narrative of the history of the gravel road and other surrounding factual circumstances. *Id.* at 570–75. Another couple, the Walkers, who owned a larger lot further to the east and were the likely successors-in-interest of the original landowner

After a three-day trial, the jury concluded that O'Dell had established a prescriptive easement to use the gravel land as an "ordinary access to his residence," and awarded O'Dell $10,000 in compensatory and punitive damages because the Stegalls intentionally interfered with O'Dell's right of ingress and egress.[307] Although the jury finding and subsequent trial court judgment in favor of O'Dell was consistent with West Virginia law at the time, the West Virginia Supreme Court of Appeals reversed the jury verdict and entered judgment for the Stegalls finding that a prescriptive easement benefitting O'Dell had not come into existence.[308]

The court's reasoning in *O'Dell* repeats most of the prescriptive easement abolitionist arguments reviewed in Part III.C above. Although the court acknowledges the historical importance of prescription in facilitating the settlement and development of West Virginia,[309] it contends that the doctrine has become problematic over time.[310] In a crucial passage, the court states:

> The doctrine essentially rewards a trespasser, and grants the trespasser the right to use another's land without compensation. Such a significant imposition on the rights of modern landowners discourages neighborly conduct and does not square with the modern ideal that we live in a congested but sophisticated, peaceful society.[311]

The court, however, was not prepared to abolish prescriptive easements altogether.[312] Instead, after surveying the doctrine's evolution in West Virginia and its theoretical rationales,[313] tidying up the elements of a prescriptive easement claim,[314] affirming that a claimant carries the burden of proving those elements by clear and convincing evidence,[315] and clarifying that in the context

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who subdivided a larger parcel, probably owned the land featuring the gravel lane. The Walkers, however, never used the gravel lane and wanted to create a wider access road elsewhere to comply with local subdivision regulations. *Id.* at 573.

307. *Id.* at 575.

308. *Id.* at 575, 581–82, 587–88, 596 (describing lower court decisions and precedents at time of those decisions).

309. *Id.* at 570.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 576–79. Notably, the court quoted and cited THE RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16, 2.17 (AM. L. INST. 2000) and the comments to those provisions extensively throughout this doctrinal exegesis. *Id.*

314. *Id.* at 578–79.

315. *Id.* at 579–80.

of prescription "adverse use" simply means a "wrongful use, made without the express or implied permission of the owner of the land,"[316] the court finally reached the decisive question: whether a claimant offering unexplained evidence of continuous and uninterrupted use of another's land and demonstrating that this use is either actually known by the landowner or so open and notorious that it is knowable, is entitled to a presumption that the use is adverse.[317]

After citing the Restatement (Third), other leading authorities, and West Virginia precedent, the court admitted that a claimant like O'Dell—at least at the time O'Dell's case went to trial—appeared to be entitled to a presumption of adverse use.[318] "Our cases," the court observed, "allow a finder of fact to conclusively presume that a use was adverse if the other elements of the prescriptive easement doctrine are established."[319]

The court, however, cast that precedent overboard, citing a litany of abolitionist arguments: (1) prescriptive easements are disfavored; (2) prescriptive easements "reward a trespasser and allow the taking of another's property without compensation;" (3) prescriptive easements do not "encourage civility between neighbors;" and (4) the presumption of adverse use "encourages expensive litigation between neighbors" and "might impel neighbors to resort to aggressive, extra-legal acts in defense of their property."[320] For these reasons, the court adopted the PPPU, declaring in unmistakable terms:

> [T]he burden of proving adverse use is upon the party who is claiming a prescriptive easement against the interests of the true owner of the land. . . . The landowner has no burden of proof. *It is the person claiming the prescriptive easement who must prove, by clear and convincing evidence, that the use of the land was adverse to the true owner of the land.*[321]

With this new presumption in place, the court reversed the trial court judgment based on two findings. First, the court reasoned that O'Dell failed to prove that the Stegalls actually owned the land on which the gravel lane was

316. *Id.* at 585. The court's discussion of what "adverse use" means goes on for many pages and relies squarely on the Restatement (Third). *Id.* at 583, 584, 585 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmts. b, f (AM. L. INST. 2000)).

317. *Id.* at 590.

318. *Id.* at 591.

319. *Id.* at 585.

320. *Id.* at 585–86.

321. *Id.* at 586 (emphasis added).

located and thus O'Dell could not prove that his "use of the gravel lane was adverse to the owner of the servient estate over which the alleged prescriptive easement crosses."[322] Second, the court observed that O'Dell had failed to prove that the decades-long use of the gravel lane by the churchgoers was anything but permissive.[323] Notice, however, that the court's adoption of the PPPU allowed it to indulge in some impressive speculation of its own on the key issue of whether some form of permission had been granted to Odell's predecessor:

> We can conceive that when Mr. Strider [the original owner of the larger parcel at the time of its original subdivision] deeded the plaintiff's lot to the German Baptist Brethren Church in 1898, he gave implicit or explicit permission for churchgoers to use the lane.[324]

On one hand, the court may be on solid ground speculating that 100 years ago the owner of the land beneath the gravel road allowed other community members to use the road in an act of "neighborly accommodation." On the other hand, after 110 years of unimpeded use of the gravel road, one might also reasonably assume that the underlying landowners relinquished any claim to exclusive use or acquiesced to an explicit or implicit grant of an easement to O'Dell's predecessor in interest.

In another recent decision, the Louisiana Supreme Court engaged in a similar analysis and employed a presumption of permissive use for cases involving the alleged acquisition of a predial servitude by acquisitive prescription under Louisiana's civil law, at least when the parties are neighbors.[325] In that case, both the plaintiff, Boudreaux, and his predecessor had used a pathway across a neighbor's property since 1948 to gain access to a public road and to transport farm equipment to and from the alleged dominant estate.[326] In 2012, the defendant, Cummings, the new owner of the alleged servient estate, blocked Boudreaux from using the pathway.[327] Although the trial court and intermediate appellate court both found that Boudreaux and his

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322. *Id.* at 592. Acknowledging that the Walkers likely owned the land underneath the gravel road, the court noted that: (1) O'Dell had settled with the Walkers; (2) the Walkers disclaimed any interest in the gravel lane in their settlement; and (3) as O'Dell's claims against the Walkers had been dismissed with prejudice, he was now precluded from establishing their ownership. *Id.* at 592 n.35.

323. *Id.* at 592.

324. *Id.*

325. Boudreaux v. Cummings, 167 So. 3d 559, 563 (La. 2015).

326. *Id.* at 560.

327. *Id.*

predecessor acquired a predial servitude of passage based on these facts,[328] the Louisiana Supreme Court, in a decision "strictly limited to the facts before [it],"[329] held that Boudreaux's use of the pathway had always been "precarious," that is, permissive, even though Cummings had not introduced any actual evidence to prove a grant of permission. Instead, reversing Louisiana's long-standing burden shifting rules in this area of law, the court declared:

> [W]e find the concept of implied permission as it relates to precarious possession is still a viable theory of our civilian law. Accordingly, even in the absence of express permission, tacit permission can be presumed under the limited circumstances where "indulgence" and acts of "good neighborhood" are present.[330]

Even though this opinion has been heavily criticized in Louisiana,[331] only garnered unequivocal support from a plurality of the Louisiana Supreme Court,[332] was subject to a withering dissent by another justice of the Louisiana Supreme Court,[333] and has not even been followed by all subsequent Louisiana intermediate appellate court decisions,[334] the majority opinion in *Boudreaux* represents another data point revealing that some U.S. judges are clearly

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328. *Id.* at 560–61.

329. *Id.* at 564.

330. *Id.* at 563.

331. Lovett, *supra* note 36, at 618–25, 694–99; 4 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 6.36 n.3 (4th ed. 2020) (cautioning that majority opinion in *Boudreaux* "should not be read broadly and should not be read to equate permission with a landowner's awareness and failure to object to a disturbance or eviction"); Andrew M. Cox, Boudreaux v. Cummings: *The Louisiana Supreme Court Presumes Away the Right to Acquire a Servitude of Passage*, 90 TUL. L. REV. 973, 984 (2016); Cody J. Miller, Boudreaux v. Cummings: *Time to Interrupt an Erroneous Approach to Acquisitive Prescription*, 77 LA. L. REV. 1143, 1144 (2017).

332. The deciding vote for the majority opinion in *Boudreaux* came from Justice John Weimer, who authored a concurring opinion that seems to adhere more closely to the traditional presumption in the Louisiana Civil Code that a long-time user of another person's land is presumed to possess with the intent to own or acquire a real right in that land. *Boudreaux*, 167 So. 3d at 568–72 (Weimer, J., concurring). For commentary on Justice Weimer's concurrence, see Lovett, *supra* note 36, at 696–98.

333. *Boudreaux*, 167 So. 3d at 565–67 (Knoll, J., dissenting); Lovett, *supra* note 36, at 695–96 (examining Justice Knoll's dissenting opinion).

334. *See, e.g.,* Walker v. S.G.B.C., LLC, 290 So. 3d 700, 706 (La. Ct. App. 2020) (affirming trial court finding of acquisition of a predial servitude under facts similar to *Boudreaux* without any reference to that decision and applying traditional presumption of adverse use in favor of claimant). On the other hand, at least one Louisiana intermediate appellate court has applied the new presumption of permissive use announced in *Boudreaux* and rejected a claim of predial servitude acquisition based on long-standing use or quasi-possession. Scrantz v. Smith, 177 So. 3d 130, 133–34 (La. Ct. App. 2015).

attracted to a framing device that requires a prescription claimant to produce unequivocal evidence of adverse use and allows a record owner to prevail when evidence concerning parties' intentions and the circumstances surrounding the inception of the allegedly prescriptive use is ambiguous or unavailable.

Just as with the PPAU, adoption of the PPPU does not guarantee that prescriptive easement claimants always lose. Courts in Alabama, for instance, regularly recite the PPPU and yet engage in factual analyses that appear more solicitous of prescriptive easement claims.[335] In a 2010 decision, the Alabama Supreme Court reversed an appellate court ruling and reinstated a trial court holding that claimants had acquired a prescriptive easement across a portion of a dirt road that provided the only ingress and egress to their property.[336] The court noted that the claimants had proven that their use was adverse, despite the nominal PPPU, based on forty years of continuous use of the dirt road without express permission of the landowners, their maintenance of an auto-mechanic shop on the dominant estate, their customers' use of the dirt road, and their regular operation of a school bus, volunteer fire department equipment, and an ambulance on the dirt road.[337] In a more recent decision, the Alabama Court of Civil Appeals similarly upheld a trial court finding of a prescriptive easement based on forty years of continuous use and maintenance of a road, in defiance of clearly posted signs, noting that the claimants did not ask for or receive permission to use the road.[338] Finally, in another recent decision, the same court concluded that claimants rebutted the PPPU and established a prescriptive easement based on evidence of open and continuous use and maintenance of a road that was the only means of vehicular ingress and egress to their property.[339] Despite their nominal adherence to the PPPU, Alabama courts thus seem to weigh heavily the long-term reliance interests of prescriptive easement

335. Barker v. Bennett, 227 So. 3d 43, 46–47 (Ala. Civ. App. 2016); Quinn v. Morgan, 215 So. 3d 1090, 1093–95 (Ala. Civ. App. 2016); *Ex parte* Gilley, 55 So. 3d 242, 246–48 (Ala. 2010).

336. *Ex parte Gilley*, 55 So. 3d at 246–48.

337. *Id.* at 246–48. In *Ex parte Gilley*, the court also disregarded deposition testimony of the claimant's predecessor in title, who seemed to have been tricked into testifying that his use of the road was not "antagonistic" to the interest of the current landowner's predecessor in title. *Id.* at 246–47.

338. *Barker*, 227 So. 3d at 46–47. In *Barker*, the court not only recited the PPPU based on well-established Alabama precedent but also acknowledged the applicability of a specialized presumption of permissive use when the claimed prescriptive easement is on a roadway located on unimproved and wooded land. *Id.* at 46.

339. *Quinn*, 215 So. 3d at 1093–95.

claimants, especially when the road or right of way provides the only practical means of vehicular ingress and egress to the claimant's property.[340]

Courts in several other states also tend to weaken the PPPU in specific contexts. In Alaska, courts deviate from the PPPU when the claimed prescriptive easement concerns "a roadway [that] was not established by the owner of the servient estate for its own use but was for many years the only means of passage to the dominant estate."[341] In North Carolina, courts recognize the PPPU but repeatedly hold that claimants can rebut this presumption by demonstrating maintenance of a private roadway through activities such as grading, gravelling, or clearing to permit travel because these actions give notice of a claim of right.[342] Finally, even in a state with a strong PPPU, such as Wyoming, a claimant can still overcome the presumption by making a strong showing that its use of another's land was adverse.[343]

In summary, the actual practice of courts that adhere to the PPPU presents a complex picture. On one hand, a robust presumption of permissive use that will disable many typical prescriptive easement claims originating in use that occurred in the distant past has gained some prominent support in decisions of the West Virginia Supreme Court of Appeals and the Louisiana Supreme Court.[344] On the other hand, other state courts recite a version of the PPPU but then undermine it with interpretive practices that privilege factors such as actual necessity, user reliance, and the mere passage of time.[345]

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340. *See supra* notes 291 and accompanying text. In both *Quinn* and *Ex Parte Gilley*, the Alabama Court of Civil Appeals relied heavily on a 1969 Alabama Supreme Court decision, *Belcher v. Belcher*. 224 So. 2d 613 (Ala. 1969). That decision seems to establish a counter-presumption of adverse use when the claimed prescriptive easement provides the only ingress and egress to the alleged dominant estate, the owners of land had actual or presumptive knowledge of that use, and that use continued for over twenty years. *Id.* at 615 (1969).

341. McDonald v. Harris, 978 P.2d 81, 85 (Alaska 1999). In *McDonald*, the court noted that the driveway at issue was not constructed by the record owner, existed when the record owner purchased the alleged servient estate, and was the only viable means of passage to the actual site of the claimant's home. *Id.* The court also observed that "[e]ven if the presumption [of permission] did arise, Harris's actions objectively asserted a right hostile to McDonald's." *Id.*

342. Town of Carrboro v. Slack, 820 S.E.2d 527, 535 (N.C. Ct. App. 2018).

343. Powder River Ranch, Inc. v. Michelena, 103 P.3d 876, 880–81 (Wyo. 2005) (holding that claimants rebutted PPPU with evidence they installed cattle guards and maintained and repaired road without record owner's permission and cut a chain barrier on another part of record owner's ranch to gain access to road and that record owner's public affidavit of limited access to ranch failed to prove that claimants had permission).

344. O'Dell v. Stegall, 703 S.E.2d 561, 580–82 (W. Va. 2010); Boudreaux v. Cummings, 167 So. 3d 559, 563 (La. 2015).

345. *See supra* notes 291–292, 294.

If the Restatement Fourth reporters share the prescriptive easement abolitionists' distaste for uncompensated transfers of property rights and, in fact, want to make prescriptive easement claims difficult to prove in most contexts without actually abolishing the common law doctrine of prescription, they could insert the PPPU directly into the Restatement Fourth. Similarly, if reporters share the views of a prominent adverse possession and prescription reformer like Lee Fennell, who argues that any adverse possession and prescription claimant should be required to declare a bad faith intention to own or acquire a property right in another person's land,[346] or like Jeffrey Stake, who would like record owners to have an easy way to signal that another person's use or possession of their land is permissive but would allow claimants to reject this signal and announce their acquisitive intent more clearly,[347] adoption of the PPPU might also make sense. If they chose this path, the Restatement Fourth reporters would need to reject unequivocally the practice of state courts that profess adherence to the PPPU but actually employ narrowing qualifications that undermine it.

The ALI, however, would be unwise to enshrine the PPPU as the official position of the Restatement Fourth. That approach paints with too broad a brush. Widespread adoption of the PPPU would make it almost impossible for most claimants to prove the acquisition of a prescriptive easement.[348] This approach would radically discount long-standing reliance interests that have accumulated social weight and have been recognized in communities for many decades.[349] Widespread adoption of the PPPU would also give courts too much license to ignore obvious evidence of observable and detectable inconsistent use by claimants without regard to social context and, moreover, would excuse property owners from any responsibility to engage in routine claim-making and sovereignty maintenance.[350]

C. The Presumption of Adverse Use with Specialized Exceptions (PAUSE)

As the previous two sections demonstrate, courts in a significant number of states (at least twenty-three according to the research underlying this Article) employ one of the relatively absolute presumptions regarding the character of

346. Fennell, *supra* note 124, at 1041, 1073–76.

347. Stake, *supra* note 124, at 2433.

348. *See, e.g.*, *O'Dell*, 703 S.E.2d at 580–82.

349. *See* Singer, *supra* note 130, at 669–70.

350. *See generally*, Katz, *supra* note 124, at 63–70, 75–78 (advancing sovereignty and inconsistent use justifications for adverse possession); Claeys, *supra* note 124, at 438–40, 453–54 (advancing productive use and claim-marking justifications for adverse possession).

the claimant's use of another's land—either the PPAU or the PPPU.[351] Both of these approaches tend to produce what Henry Smith calls "relative invariance," the tendency of certain property rules to operate in a formalistic and decontextualized manner, a concept that appears to form a crucial element of his architectural vision of property law.[352]

What complicates this picture, however, is that courts in most other states employ a more thoroughly contextualized approach to setting the presumptions applicable to determining whether a prescriptive easement claimant's alleged use of the record owner's land is permissive or adverse.[353] In other words, in these states, courts practice a kind of *contextual variance*, rather than the "relative invariance" that Smith claims to be an essential feature of property.[354] This practice of contextual variance, however, follows a predictable pattern. Courts begin their adversity analyses in prescriptive easement disputes by announcing their general adherence to the PPAU but then immediately articulate a counter-presumption of permissive use in one or more specialized

351. *See supra* Parts IV.A, IV.B.

352. Smith, *supra* note 4, at 1711 ("The decontextualization means that in property we try to keep the interface simple and standardized (for example, through the *numerus clausus* principle) and ration its complexity. Property law is formal in the sense of *relative invariance* (not complete invariance) to context.") (emphasis added). Smith's schema for conceptualizing property law as a system consists of three first-order features: (1) the in rem nature of property; (2) the right to exclude; and (3) the residual claim, by which Smith seems to mean the capacity for ownership to be disaggregated or dismembered into constitutive sticks or elements on the inside, although some residual ownership claim remains that must be respected by those outside of the sphere of ownership. *Id.* at 1709–10. These three primary or first-order features, however, are not "sticks" in a "bundle of rights" in Smith's view. Instead, they are "automatic, presumptive features of an exclusionary modular strategy." *Id.* at 1710. The three "secondary" features of property law, in Smith's architectural program are: (1) alienability; (2) persistence; and (3) compatibility. *Id.* at 1711–12. Smith's claim about the importance of decontextualization and modularity, which he has repeated throughout out much of his scholarship, is here linked to exclusion. As Smith explains in a key passage in his seminal article: "The point of defining things on the basis of exclusionary proxies is that uses and attributes on the 'inside' are complimentary, but the need to track connections between inside attributes and the outside world can be limited to those connections built into the interface between modules (which correspond to the most important spillover effects))." *Id.* at 1710–11. Smith introduces the concept of "relative invariance" right after this statement, in the sentences quoted at the beginning of this note, and he defines this concept in terms of formalism, as the key ingredient that produces all of the essential secondary features of property, namely alienability, persistence, and compatibility. *Id.* at 1711–12. In Smith's architectural vision, these two tripartite schemas are complimented by a third, tripartite division of "higher-level architectural features – recursion, scalability, and resilience," features that are promoted by modularity and "preserve options and make property more useful." *Id.* at 1712.

353. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

354. Smith, *supra* note 4, at 1711.

circumstances.[355] The result is a third general approach to presumption setting in the context of prescriptive easement claims, the PAUSE approach.[356]

Although this common judicial practice, the PAUSE approach, might seem to lead to a confusing, highly contextualized, and perhaps cost-intensive property law design, on closer examination, it has some distinct advantages. First, some of the specialized circumstances that justify application of a counter-presumption of permissive use (particularly those keyed to the formal status of the parties as relatives, prior licenses, or public easement claimants, or keyed to the nature of the land as wild, unenclosed or undeveloped land) are relatively easy to identify and thus still produce relatively mechanical and invariant decision-making by judges and can still lead to predictability for parties and modularity for the easement system writ large.[357] Second, the normative justifications for some of these counter-presumptions are intuitively attractive, especially for several of the status-based exceptions, the wild lands exceptions, and the community custom of neighborly accommodation exception.[358] These counter-presumptions promote certain kinds of social relationships among property owners and non-owner users that are desirable on a number of levels.[359] Finally, even when the specialized circumstances are not easily identified and broken down into clear, invariant patterns (as happens when courts attempt to create counter-presumptions based on the particular construction history and degree of sharing of a road or particularized histories of neighborly cooperation or neighborly accommodation), the fact-intensive and relational inquiries demanded by these versions of the PAUSE approach, may be worth the effort if they can produce just outcomes in these particularly hard cases.[360] Indeed, it is precisely in hard cases that context matters the most and where hard-edged rules that seem to offer the advantage of determinacy must often give way to muddier standards that allow for the practice of normative judgment and eventually produce their own determinacy and transparency.[361]

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355. *See* cases discussed *infra* Part IV.C.i.–iv.

356. *See infra* Section V.

357. *See infra* Sections IV.C.i.–ii.

358. *See infra* Section IV.C.ii.

359. *See infra* Section IV.C.ii.

360. *See infra* Sections IV.C.i.–iv.

361. Mulvaney, *supra* note 232 at 110; Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 599–600 (1988). As Mulvaney notes, muddier, more indeterminate standards are particularly appropriate in the context of disputes about access to important natural resources, such as

This section identifies and analyzes four broad variations of the PAUSE approach. It concludes by suggesting that the Restatement Fourth reporters should articulate a version of the PPAU but couple that with several specialized counter-presumptions based on the exceptions stated in the case law discussed below. In essence, this section recommends a modified version of the PAUSE approach to presumptions of adversity and permissiveness for prescriptive easement law.

i. Status-Based Exceptions

The first general category of exceptions to the PPAU focusses on the status of the individuals involved in a prescriptive easement dispute or the nature of the easement claimed. There are three sub-categories of status-based exceptions. The first involves claimants who are personally related by family affiliation to alleged servient estate owners.[362] The second involves claimants who have explicit contractual relationships with alleged servient estate owners, usually through a formal licensor-licensee relationship.[363] The last exception focuses on claimants seeking recognition of easements in gross benefiting the public at large and is status-based in the sense that these claimants are not neighbors of an alleged servient estate owner and do not own a purported dominant estate.[364] The first two status-based exceptions—for family relationships and prior contracts—are narrow in scope, relatively easy to apply, and generally consistent with rationales for preservation of prescriptive easements and adverse possession.[365] The last exception—for public easement claimants—is also easy to identify, and switching the burden of proof can be justified by the distinct nature of the property interest claimed.[366] Thus these

beaches, where over-inclusive rules of either no-access-at-all or unlimited access can either frustrate legitimate needs for recreational access or could lead to a tragedy of the commons through over-use, particularly by mechanized vehicles. *Id.* at 132–33. In addition, as Mulvaney notes, robust exclusionary or access rules often produce indeterminacy because they do not "automatically determine the scope of its own application," whereas apparently "open-ended" standards "take shape through applications that reveal core archetypes, and, therefore result in 'holdings' that take a form similar to the rules that were thought to be so clear in Oregon and Texas." *Id.* at 122. On the transparency of beach access standards. *See id*. at 125–30.

362. *See, e.g.*, Riffle v. Smith, 86 A.3d 1165, 1167 (Me. 2014).

363. *See, e.g.*, Branson v. Miracle, 729 P.2d 408, 410 (Idaho Ct. App. 1986).

364. *See, e.g.*, Lincoln v. Burbank, 147 A.3d 1165, 1173 (Me. 2016).

365. *See generally,* Grant v. Ratliff, 79 Cal. Rptr. 3d 902 (Cal. Ct. App. 2008); *Branson*, 729 P.2d at 410.

366. *See, e.g.,* cases cited *infra* notes 389–99.

versions of the PAUSE approach can easily be incorporated into the Restatement Fourth framework for presumptions of adversity.

Family Ties: The first status-based specialized exception arises when the two parcels of land involved in a prescriptive easement dispute are either currently owned by members of the same family or were owned by members of the same family when the alleged prescriptive use began.[367] Although this exception is noted in hornbooks and treatises,[368] in recent years only a handful of decisions have recognized and applied this exception and most of those decisions simultaneously recognized other exceptions. New York courts, for instance, apply a general presumption of hostility (adverseness) when the other elements of a prescriptive easement claim have been established,[369] but require the proponent of a prescriptive easement to prove hostility when "the user and landowner are, *among other things*, related by blood."[370] Courts in Maine similarly recognize a "familial relationship" exception along with other exceptions.[371] The same pattern holds in Montana,[372] New Mexico,[373] and

367. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

368. SINGER, *supra* note 44, § 5.4; 4 POWELL, *supra* note 14, § 34.10(2)(c); KORNGOLD, supra note 16, § 3.29.

369. Colin Realty Co. v. Manhasset Pizza, LLC, 26 N.Y.S.3d, 606, 608 (App. Div. 2016) (quoting Duckworth v. Ning Fun Chiu, 822 N.Y.S.2d 147, 147 (App. Div. 2006)); Brocco v. Mileo, 565 N.Y.S.2d 602, 603–04 (App. Div. 1991); Reiss v. Maynard, 539 N.Y.S.2d 228, 228–29 (App. Div. 1989), *appeal after remand*, 514 N.Y.S.2d 309 (App. Div. 1987).

370. Sadowski v. Taylor, 867 N.Y.S.2d 574, 577 (App. Div. 2008); Weinberg v. Shafler, 414 N.Y.S.2d 61, 63 (App. Div. 1979). New York courts also recognize a more general counter-presumption when there has been a showing of a "neighborly relationship" between the parties. Bekkering v. Christiana, 119 N.Y.S.3d 622, 626 (App. Div. 2020); Hassinger v. Kline, 457 N.Y.S.2d 847, 847–48 (App. Div. 1983).

371. Lincoln v. Burbank, 147 A.3d 1165, 1173 (Me. 2016) (stating that a presumption of permission arises only when either (1) the public uses private property for recreational uses, or (2) use at issue is by family members); Riffle v. Smith, 86 A.3d 1165, 1167 (Me. 2014) (stating family member exception); Androkites v. White, 10 A.3d 677, 683–84 (Me. 2010) (stating the same and holding that claimant's use of footpath over neighbor's property was not presumptively adverse because claimants were related to neighbor's predecessor-in-title). In the absence of a family relationship or a claim of public recreational easement, Maine courts apply the PPAU. *See* Jost v. Resta, 536 A.2d 1113, 1114 (Me. 1988).

372. Cope v. Cope, 493 P.2d 336, 338–39 (Mont. 1971). For discussion of other Montana counter-presumptions, see *infra* notes 384, 453, 467–78 and accompanying text.

373. Jaramillo v. Romero, No. 32,298, 2013 WL 5741827, at *4–5 (N.M. Ct. App. Sept. 23, 2013) (applying presumption of permissive use in case involving "large bodies of unenclosed land" and in which "the historical owners of that land . . . were all closely related family members"). New Mexico courts also apply a presumption of permissive use for unenclosed, wild land under its so-called "neighbor accommodation exception." *See* Algermissen v. Sutin, 61 P.3d 176, 182 (N.M. 2002), discussed *infra* note 408.

Washington.[374] Courts in Minnesota,[375] Pennsylvania[376] California,[377] and Missouri[378] also appear to recognize the family-member exception as the sole deviation from the general rule that unexplained use is presumptively adverse.

Courts justify this special exception in various ways. One California court simply reasons that unless there is evidence of unusual acrimony, family members should be presumed to be accommodating one another based on family bonds.[379] The Maine Supreme Judicial Court also notes that related family members should have better access to relevant information of past adverse use than unrelated strangers and therefore can more easily provide pertinent rebuttal evidence.[380] While these judicial intuitions may not always be borne out by the facts, they do seem plausible. Another advantage of the family member counter-presumption is that usually there will be little factual dispute over the existence of a familial relationship.[381] Courts employing this status-based version of PAUSE will thus enjoy the relatively crystalline features of either the PPAU or its symmetrical opposite, the PPPU, while still

374. Granston v. Callahan, 759 P.2d 462, 465–66 (Wash. Ct. App. 1988). For discussion of Washington's other counter-presumptions, see *infra* notes 411, 440, 456, 472, and accompanying text.

375. Boldt v. Roth, 618 N.W.2d 393, 396 (Minn. 2000) (citing Wojahn v. Johnson, 297 N.W.2d 298, 306 (Minn. 1980)); Burns v. Plachecki, 223 N.W.2d 133, 135–36 (Minn. 1974); Pickar v. Erickson, 382 N.W.2d 536, 538 (Minn. Ct. App. 1986). In the absence of family relationships, Minnesota courts apply the PPAU. Nordin v. Kuno, 287 N.W.2d 923, 926–27 (Minn. 1980); *Burns*, 223 N.W.2d at 135–36.

376. Watkins v. Watkins, 775 A.2d 841, 846 (Pa. Super. Ct. 2001) ("where a familial or fiduciary relationship exists, permissive use will be presumed, thereby negating the element of hostility."). In the absence of family relationships, Pennsylvania courts apply the PPAU. Vill. of Four Seasons Ass'n v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822 (Pa. Super. Ct. 2014); Gehres v. Falls Twp., 948 A.2d 249, 253 (Pa. Commw. Ct. 2008) (stating the same).

377. Grant v. Ratliff, 79 Cal. Rptr. 3d 902, 906 (Cal. Ct. App. 2008) (noting that presumptions of adverse use are generally unclear but observing the fact that "the alleged adverse users [were] the landowner's sons travelling to and from their former family home is more than sufficient to rebut a presumption affecting the burden of producing evidence and, even sufficient to rebut a presumption affecting the burden of proof").

378. Brick House Café & Pub, LLC v. Callahan, 151 S.W.3d 838, 844 (Mo. Ct. App. 2004). Outside of this exception, Missouri courts routinely apply the PPAU. Neale v. Kottwitz, 769 S.W.2d 474, 475–76 (Mo. Ct. App. 1989); Day v. Grisham, 571 S.W.2d 473, 475 (Mo. Ct. App. 1978).

379. *Grant*, 79 Cal. Rptr. 3d at 906.

380. Androkites v. White, 10 A.3d 677, 683 (Me. 2010).

381. *See* cases cited *supra* notes 372–380.

being able to apply some important contextualization to prescription disputes.[382]

Prior Contracts and Licenses: The second status-based exception to the presumption of adverse use applies to prescriptive easement claimants who previously enjoyed some contractual right to use the same portion of the alleged servient estate owner's land (for example pursuant to a license) but that contractual relationship allegedly ended or produced ambiguity.[383] In one recent decision, for example, the Montana Supreme Court refused to recognize a claimed prescriptive easement for surface irrigation through a ditch because the parties had previously entered into a right of way agreement for the establishment and use of an underground water transportation pipeline in the same area which either expressly or impliedly established permission from the grantor of the pipeline right of way.[384] The New Hampshire Supreme Court recently reached a similar result in a case involving a sewer line installed by a city pursuant to an initial revocable license, [385] noting that "[w]hen use of another's land begins with permission, it cannot become adverse in nature without an explicit repudiation of the earlier permission."[386] On the other hand, the mere existence of an express easement burdening land does not necessarily lead to a presumption of permissive use if a dominant estate owner claims the right to use an expanded area of the servient estate based on prescription.[387] In any event, just like the counter-presumption of permissive use for family relationships, this status-based exception based on prior contractual relationships is narrow in scope, can be applied in a mechanical fashion, and can easily be incorporated into the Restatement Fourth framework for adversity presumptions as either an independent rule running parallel with, or forming an exception to, the PPAU.

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382. Of course, an argument can be made that the five states that recognize only the family member exception to the PPAU should be counted as part that contingent because this counter-presumption is so narrow and can be applied relatively mechanistically. If so, one might say nineteen states apply the PPAU. *See supra* Section IV.A.

383. 4 POWELL, *supra* note 14, § 34.10(2)(c) n.22; Branson v. Miracle, 729 P.2d 408, 410 (Idaho Ct. App. 1986) (cautioning that licensee cannot unilaterally repudiate license to begin prescriptive easement unless licensor received actual notice of repudiation); Wimberly v. Lake Weir Yacht Club Ass'n, 480 So. 2d 224, 224–25 (Fla. Dist. Ct. App. 1985) (stating the same).

384. Bos Terra, LP v. Beers, 354 P.3d 572, 578–79 (Mont. 2015).

385. Boyle v. City of Portsmouth, 235 A.3d 985, 988–89 (N.H. 2020).

386. *Id.* at 989.

387. Turner v. Bouchard, 32 A.3d 527, 536–37 (Md. Ct. Spec. App. 2011) (stating that an express easement can potentially be enlarged by prescription if the dominant estate owner can show affirmative evidence of adverse use).

Easements in Gross Benefitting the Public: The final status-based exception to the general presumption of adverse use applies when claimants seek recognition of an easement in gross benefitting the public at large (often, but not always, for recreational purposes) rather than an appurtenant easement benefiting a neighboring parcel of land.[388] Maine courts recognize that when claimants seek recognition of a public easement for recreational uses, the law will presume that the alleged use was permissive rather than adverse from the outset.[389] Indiana courts restrict application of the PPAU when the prescriptive use is recreational in nature, at least in the context of use of a water body, even if the claimant is only seeking a private recreational easement.[390] Vermont courts apply the traditional presumption of adverse use in most cases,[391] but note that when members of the public at large claim their use established a public easement, the claimants must prove their use was not permissive.[392]

This variation of the PAUSE approach applicable to public easements can be justified on various grounds. First, the scope of the exception is easy to demarcate because the claimant or claimants will identify from the outset the nature of the easement sought.[393] Second, the ramifications of judicial recognition of an easement in gross benefitting the public are quite significant for the landowner.[394] This kind of easement constitutes a broader intrusion into the sphere of autonomy traditionally associated with fee simple ownership of land than a private appurtenant easement benefitting one or a small number of dominant estates.[395] Not only will a potentially unlimited number of persons be able to use the easement, but it may be more difficult for the servient estate

388. *See, e.g.,* Jesurum v. WBTSCC Ltd. P'ship, 151 A.3d 949, 953 (N.H. 2016).

389. Lincoln v. Burbank, 147 A.3d 1165, 1173 (Me. 2016); Lyons v. Baptist Sch. of Christian Training, 804 A.2d 364, 370 (Me. 2002) ("public recreational uses of unposted open fields or woodlands and the ways through them are presumed permissive").

390. Carnahan v. Moriah Prop. Owners Ass'n, 716 N.E.2d 437, 442 (Ind. 1999) (acknowledging rebuttable presumption that unexplained use of a path or road or lands of another for twenty years is adverse but refusing to apply that presumption to recreational use of a body of water and restricting presumption to "obvious path[s] or road for ingress and egress over the lands of another").

391. Wells v. Rouleau, 955 A.2d 518, 521 (Vt. 2008); Buttolph v. Erikkson, 648 A.2d 824, 825 (Vt. 1993); Russell v. Pare, 321 A.2d 77, 82 (Vt. 1974) (stating that open and notorious use gives rise to presumption of claim of right).

392. Cmty. Feed Store, Inc. v. NE Culvert Corp., 559 A.2d 1068, 1072–73 (Vt. 1989) (observing that "[t]he general rule is that open and notorious use will be presumed to be adverse," but also noting counter-presumption that *public use* of private property is by permission); Begin v. Barone, 207 A.2d 252, 254 (Vt. 1965); Gore v. Blanchard, 118 A. 888, 891 (Vt. 1922).

393. *See, e.g., Jesurum,* 151 A.3d at 953.

394. *See, e.g., id.*

395. *See, e.g., id.* at 956–57.

owner to identify a party willing and capable of negotiating a termination, modification, or relocation of the easement than would be the case with a traditional appurtenant easement.[396] Finally, judicial recognition of an easement in gross benefiting the public at large will tend to resemble an uncompensated expropriation for the benefit of the public and thus could be uniquely demoralizing in the absence of just compensation.[397] For all of these reasons, it makes sense to incorporate a version of the PAUSE approach that produces a counter-presumption of permissive use for public easement claimants.[398]

ii. Exceptions Based on the Character of the Land—Wild, Unenclosed and Undeveloped Land (The Wild Lands Exception)

The second broad category of exceptions to the PPAU concerns the character of the land forming an alleged servient estate. Courts have used varying terms to describe this kind of exception, but the general theme running through all of the judicial formulations is that when a claimant's allegedly adverse use of another person's land has occurred on wild, sparsely inhabited, unenclosed, or unimproved lands, the burden of proving adverseness should fall on the claimant rather than the owner of the purported servient estate.[399] Courts in many states use some version of this exception, including those in

396. Although a governmental entity might be capable of terminating, modifying, or relocating an easement in gross benefiting the public at large, many public officials might be reluctant to enter into such an agreement, fearing a backlash from public users of the easement and accusations of selling-out the public interest.

397. *See Jesurum,* 151 A.3d at 959 (illustrating a situation where a public prescriptive easement was created, and the landowners were not compensated).

398. The strongest argument against application of the PAUSE approach for public recreation easements is that the actual identity of the alleged adverse users—claimants who are not immediate neighbors of the record owner of the land, not related to the record owner by family, and do not have a contract-based licensee relationship—should arouse the suspicion of any reasonably attentive landowner and thus a landowner who sees or could see members of the general public regularly crossing or using their land should not be entitled to the indulgence of a favorable presumption of permission. This seems to be the implicit explanation for application of the PPAU in cases involving public recreation easements in states like New Hampshire. *See Jesurum*, 151 A.3d at 956–57, discussed *supra* notes 265–274 and accompanying text.

399. KORNGOLD, *supra* note 16, § 3.29; BRUCE & ELY, *supra* note 16, § 5.3; 7 THOMPSON, *supra* note 46, § 60.03(b)(6)(viii); RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

Arkansas,[400] Colorado,[401] Idaho,[402] Illinois,[403] Maryland,[404] Missouri,[405] Nebraska,[406] New Jersey,[407] New Mexico,[408] Oregon,[409] South Dakota,[410]

400. Fullenwider v. Kitchens, 266 S.W.2d 281, 283 (Ark. 1954) ("a passageway over unenclosed [sic] and unimproved land is deemed to be permissive"); Merritt Mercantile Co. v. Nelms, 269 S.W. 563, 565 (Ark. 1925).

401. Durbin v. Bonanza Corp., 716 P.2d 1124, 1129 (Colo. App. 1986) (vacant, unenclosed, and unoccupied land). *But see* Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC, No. 18CA2250, 2020 WL 939236, at *2–6 (Colo. App. Feb. 27, 2020), *cert. granted*, No. 20SC292, 2020 WL 5405376 (Colo. Sept. 8, 2020) (stating PPAU in context of land used by a condominium association for amenities and convenience).

402. Chen v. Conway, 829 P.2d 1355, 1359–60 (Idaho Ct. App. 1991) (stating that the "wild, unenclosed or unimproved land exception occurs when the servient land is wild, and someone uses that land to reach their own land"). Idaho courts have applied the PPAU in cases not involving wild lands and recognized prescriptive easements. *See* Marshall v. Blair, 946 P.2d 975, 980–82 (Idaho 1997); Lorang v. Hunt, 693 P.2d 448, 449 (Idaho 1984).

403. Chi. Title Land Tr. Co. v. JS II, LLC, 977 N.E.2d 198, 214 (Ill. App. Ct. 2012) (describing exception for "vacant and unoccupied and unenclosed" land); Weihl v. Wagner, 569 N.E.2d 297, 299 (Ill. App. Ct. 1991) (stating the same). Illinois courts apply the PPAU in cases not involving wild lands. *See* Light v. Steward, 470 N.E.2d 1180, 1187 (Ill. App. Ct. 1984); Smith v. Mervis, 348 N.E.2d 463, 465 (Ill. App. Ct. 1976).

404. Clickner v. Magothy River Ass'n, 35 A.3d 464, 482, 482–87 (Md. 2012) (recognizing a "woodlands exception" when an easement is claimed on "land that is unimproved or in a general statement of nature, there is a legal presumption that the use is by permission of the owner" and holding that use of dry sand portion of uninhabited, uncultivated and undeveloped river island beach was presumed to be permissive and thus denying claim of prescriptive easement in favor of the public). Maryland courts regularly apply the PPAU when the land in dispute is not characterized as "woodlands." Turner v. Bouchard, 32 A.3d 527, 537–538 (Md. Ct. Spec. App. 2011); Mavromoustakos v. Padussis, 684 A.2d 51, 54–56 (Md. Ct. Spec. App. 1996); Potomac Elec. Power Co. v Lytle, 328 A.2d 69, 73 (Md. Ct. Spec. App. 1974); Zehner v. Fink, 311 A.2d 477, 480 (Md. Ct. Spec. App. 1973).

405. Carpenter-Union Hills Cemetery Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 201–02 (Mo. Ct. App. 1977) (discussing extensive Missouri case law and acknowledging but not applying unenclosed "wild land" exception for land that is "wild, unfenced, open woods" or "unenclosed, rough woods, brush, prairie or waste land").

406. Melendez v. Holling, 927 N.W.2d 834, 840–41 (Neb. Ct. App. 2019) (recognizing exception for "unenclosed wilderness"); Feloney v. Baye, 815 N.W.2d 160, 165–67 (Neb. 2012) (recognizing exception for "unenclosed and undeveloped" land).

407. Kruvant v. 12–22 Woodland Ave. Corp., 350 A.2d 102, 111–13 (N.J. Super. Ct. Law Div. 1975) (recognizing "conflicting presumption" that casual use of vacant, unenclosed and unimproved land is permissive, but refusing to apply this presumption because use of bridle path by riding club was daily, not casual, and area in question was adjacent to major road commercial establishments).

408. Algermissen v. Sutin, 61 P.3d 176, 182 (N.M. 2002) (stating that a court should not presume adverse use under the so called "neighbor accommodation exception" which arises when the "claimed right of way traverses large bodies of open, unenclosed and sparsely populated privately owned land," and which is based on reasoning that landowners in such situations cannot reasonably know of alleged

Washington,[411] and Wisconsin.[412] Somewhat confusingly, courts in New Mexico also call the vacant or undeveloped lands exception a "neighborhood accommodation" exception,[413] a term that courts in other states use to refer to an exception based on the nature of the social relationship between the disputing landowners rather than any physical characteristics of the land itself.[414] Georgia, on the other hand, does not change presumptions of adversity but does provide a longer statutory prescriptive period for "wild" lands.[415] Pennsylvania goes further and actually prohibits acquisition of rights of way through unenclosed woodlands.[416]

Courts offer a number of related justifications for this deviation from the PPAU based on the wild, undeveloped character of the land. Some courts note

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prescriptive use). Outside of this wild lands context, New Mexico courts recognize that use is presumed adverse when the other elements of a prescriptive easement claim are satisfied and there is no proof of express permission. Brannock v. Lotus Fund, 367 P.3d 888, 897 (N.M. Ct. App. 2015).

409. Rendler v. Lincoln Cnty., 709 P.2d 721, 726 (Or. Ct. App. 1985) (stating that the presumption of permissive use for land that is "unenclosed or unimproved").

410. Rancour v. Golden Reward Mining Co., 694 N.W.2d 51, 54 (S.D. 2005) (stating the exception for "wild or unenclosed" land). *But se*e Helleberg v. Estes, 943 N.W.2d 837, 842–43 (S.D. 2020) (applying traditional PPAU in context of a road within in a residential subdivision).

411. Gamboa v. Clark, 348 P.3d 1214, 1217 (Wash. 2015) (stating the exception for "unenclosed land").

412. Cnty. of Langlade v. Kaster, 550 N.W.2d 722, 726 (Wis. Ct. App. 1996) (citing case law and WIS. STAT. ANN. § 893.28(3) for presumption of permissiveness for "use of a way over unenclosed land;" noting "every reasonable presumption must be made in favor of the landowner"). *But see* Ludke v. Egan, 274 N.W.2d 641, 646 (Wis. 1979) (stating that unexplained, twenty-year use is presumed adverse under a claim of right, but holding that use of road to reach landlocked estate was permissive as facts established grant of way of necessity).

413. *Algermissen*, 61 P.3d at 182; Scholes v. Post Off. Canyon Ranch, Inc., 852 P.2d 683, 684–85 (N.M. Ct. App. 1992).

414. *See generally infra* Section IV.C.iv.

415. GA. CODE ANN. § 44-9-1. *See* Henderson v. Cam Devel. Co., 378 S.E.2d 495, 496 (Ga. Ct. App. 1989) (holding that land containing picnic area, buildings and an old barn was not "wild" land within meaning of Georgia statute, GA. CODE ANN. § 44-9-1, providing twenty-year prescription, rather than seven year prescription, as under GA. CODE ANN. § 44-9-59, if land is improved; for land to qualify as "wild" within meaning of GA. CODE ANN. § 44-9-1, it must be "a segregated tract of land, remaining as it were, in a state of nature, unenclosed, and with no indicia pointing to use by the owner . . . ." and the mere fact that land was unused at time it was purchased by record owner does not render it "wild land").

416. 68 PA. STAT. AND CONS. STAT. § 411 (West 2020). *See* Martin v. Sun Pipe Line Co., 666 A.2d 637, 640–641 (Pa. 1995) (applying 68 PA. STAT. § 411, which prohibits acquisition of rights of way by prescription through unenclosed woodland, to lands that were heavily forested and not enclosed by fencing or any other artificial barrier and that record owners intended to preserve for their natural beauty).

that when an alleged servient estate is a large, unenclosed tract of land in a natural or undeveloped state, the owner may find it difficult to detect another person using its land.[417] In addition to this *invisibility of use* rationale, courts also speculate that even if a landowner could detect such use the landowner may be uninterested in protecting this kind of land from intrusions or may simply be willing to accommodate casual access in a spirit of neighborliness because another person's use does not present any immediate danger of harm.[418] In explaining this *lack of evident harm* rationale, courts sometimes speculate that an owner of undeveloped, open land would generally have "no reason to think the users . . . were attempting to acquire any adverse right."[419] As noted above, Pennsylvania has taken the rationales underlying the wild lands exception a step further and enacted a statute that prohibits entirely the acquisition of a prescriptive easement through an unenclosed woodland.[420] Similarly, but less drastically, Wisconsin has enacted a statute that codifies the wild lands counter-presumption of permissive use.[421]

Much like the status-based exceptions detailed at the beginning of this section, the counter-presumption of permissive use for wild lands provides a relatively clear-cut and mechanistic rule whose scope is not especially difficult to define.[422] Indeed, courts appear to have little difficulty determining whether an alleged servient estate qualifies as undeveloped, unenclosed, and remote land as opposed to undeveloped, vacant land in an urban, suburban, or agricultural setting where the rationales for the exception are less salient.[423]

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417. Breeding v. Koste, 115 A.3d 106, 119 (Md. 2015); Rancour v. Golden Reward Mining Co., 694 N.W.2d 51, 54 (S.D. 2005); Kruvant v. 12–22 Woodland Ave. Corp., 350 A.2d 102, 112–13 (N.J. Super. Ct. Law Div. 1975); Fullenwider v. Kitchens, 266 S.W.2d 281, 283 (Ark. 1954).

418. *Breeding*, 115 A.3d at 119; Feloney v. Baye, 815 N.W.2d 160, 166 (Neb. 2012); *Rancour*, 694 N.W.2d at 54; *Kruvant*, 350 A.2d at 112–13; *Fullenwider*, 266 S.W.2d at 283.

419. *Rancour*, 694 N.W.2d at 54.

420. 68 PA. STAT. AND CONS. STAT. ANN. § 411 (West 2020). For cases interpreting this statute, see BRUCE & ELY, *supra* note 16, § 5.3 n.12.

421. WIS. STAT. ANN. § 893.28(3) (West 2020). *See* County of Langlade v. Kaster, 550 N.W.2d 722, 726 (Wis. Ct. App. 1996) (applying same).

422. *See supra* Section IV.C.i.

423. *See, e.g., Feloney*, 815 N.W.2d at 166 ("The presumption of permissiveness arises when the land is unenclosed wilderness; the presumption is not properly applied to an unenclosed parking lot in a downtown shopping center nor is it applicable to a driveway in a suburban neighborhood."); Turner v. Bouchard, 32 A.3d 527, 538 (Md. Ct. Spec. App. 2011) (easily rejecting argument that Maryland's "woodlands exception" applied to two "quarter-acre parcels located in a subdivision with hundreds of other similar sized parcels," where both lots were "improved with houses and driveways, as well as less formal clearings that are used as paths to access lake" and both lots were "bounded by

Admittedly, a large, unenclosed tract of pasture land or a large, unenclosed vacant lot in a peri-urban setting could provide more of a challenge to a court faced with determining the scope of the exception. As yet, however, the cases do not reveal that courts struggle with these geographic distinctions.

Another reason for incorporating a counter-presumption of permissive use for wild, unenclosed, and undeveloped land in the Restatement Fourth is that many of the leading scholarly rationales that support preservation of prescription and adverse possession doctrine more generally would nevertheless accommodate this specific and relatively crystalline counter-presumption of permissive use.[424] A conception of an owner as a powerful sovereign responsible for asserting dominion vis-a-vis non-owners would seem to support a strong counter-presumption of permissive use in the context of land that is open, not easy to monitor, and can easily accommodate other kinds of uses.[425] Moreover, a defense of prescription and adverse possession based on the importance of preventing inconsistent uses from occurring on one's property and of communicating dominion through claim-marking would also clearly be consistent with a strong counter-presumption of permissive use in the context of wild, unenclosed, and undeveloped land.[426] Even a conception of adverse possession and prescription that privileges active declarations of bad faith would be consistent with this kind of counter-presumption.[427] Conversely, and switching focus to the purported reliance interests of the user-claimant, even a long-term user of wild, unenclosed and undeveloped land would normally have a weaker basis to argue that she has developed a reasonable expectation of acquisition of an actual property interest in such land, given the likelihood that the servient estate owner and other members of the community

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a retaining wall"); Carpenter-Union Hills Cemetery Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 201–02 (Mo. Ct. App. 1977) (discussing whether "wild lands" exception applied); Rendler v. Lincoln Cnty., 709 P.2d 721, 726 (Or. Ct. App. 1985) (finding that wild lands presumption of permissive use did not apply because the property at issue "is near fenced areas," claimant's members were "confronted by property owners who claimed that members were trespassing" and that property "is not far from improvements on appellants' land"); Henderson v. Cain Devel. Co., 378 S.E.2d 495, 496 (Ga. Ct. App. 1989) (determining lands did not qualify as wild but were improved based on evidence of old improvements); Martin v. Sun Pipe Line Co., 666 A.2d 637, 641 (Pa. 1995) (determining lands were unenclosed woodland).

424. RESTATEMENT (THIRD) OF PROP: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

425. *See generally* Katz, *supra* note 124.

426. Claeys, *supra* note 124, at 440, 453–54.

427. Fennell, *supra* note 124, at 1041, 1073–76.

are less likely to have noticed the underlying use and communicated signals of acquiescence or community recognition.[428]

A final reason for preserving and foregrounding the wild lands counter-presumption in the Restatement Fourth is that it answers an important critique of American property law advanced in the 1990s.[429] In that critique, John Sprankling argued that too much of American property law was biased in favor of the development of wilderness land.[430] To remedy this bias, Sprankling advocated for, among other reforms, a statutory "Wildlands Exemption" to the law of adverse possession.[431] He also suggested that courts could achieve a similar outcome by redefining the "exclusivity" element of an adverse possession claim by stating that an owner who utilizes his land in a manner suited to its "location, nature and condition precludes exclusivity and thus insulates the property from adverse possession," and, in particular, by holding that an owner who engages in "non-consumptive, recreational uses such as hiking, camping, picnicking, bird-watching and the like" precludes a claimant from establishing exclusivity.[432] Building on Sprankling's foundational articles and observing that privately owned wild lands, which are not protected by conservation easements, are still at risk from adverse possession claims, Alexandra Klass argues that U.S. courts should modernize adverse possession doctrine by counting evidence of a landowner's conservation intent as both use

428. Singer, *supra* note 130, at 669–70.

429. Sprankling, *Environmental Critique of Adverse Possession*, *supr*a note 172, at 816–17; Sprankling, *Anti-Wilderness Bias*, *supra* note 172, at 520.

430. Sprankling, *Environmental Critique of Adverse Possession*, *supra* note 172, at 818–53 (criticizing the excessively pro-development bias of adverse possession doctrine as it developed in U.S. courts in the nineteenth and twentieth centuries and the unsuitability of that doctrine to wild lands in the current environment of greater recognition of the ecological and conservation value of wild lands); Sprankling, *Anti-Wilderness Bias, supra* note 172, at 533–56, 569–84 (arguing that a persistent anti-wilderness bias infects not only adverse possession doctrine in the context of title and boundary disputes, but also the law of waste, the bona fide purchaser doctrine, the good faith improver doctrine, the law of trespass, and the law of nuisance).

431. Sprankling, *Environmental Critique of Adverse Possession*, *supra* note 172, at 863–65. Sprankling recommended that legislatures should act to bar an adverse possession claim whenever the land at issue was in a substantially wild condition immediately before the relevant statutory limitation period began to run. *Id.* at 864.

432. *Id.* at 865–66. Because "exclusive" use is usually not a requirement for a prescriptive easement claim, Sprankling's proposals for redefining that element to take account of a landowner's non-consumptive or recreational uses are less salient in the context of restating the law of prescriptive easements. *See supra* notes 41–45 and accompanying text (explaining primary elements and limited role of exclusive use in prescription).

and actual possession of land.[433] Doing so would prevent adverse possession claimants from obtaining title to wild lands through minimal cultivation or development because the claimant's activities could not be characterized as "exclusive" possession of the land.[434] Recognition of a counter-presumption of permissive use in prescription doctrine would accomplish many of the objectives articulated by Sprankling and Klass through a simple and easy-to-administer judicial tool that would not require rewriting other elements of the basic doctrine.

The case law reviewed above detailing the relatively widespread adoption of a counter-presumption of permissive use in the context of prescription claims involving wild and undeveloped lands demonstrates that many American courts are already quite sensitive to the concerns Sprankling raised more than two decades ago. The Restatement Fourth can now solidify this trend by inserting a PAUSE exception keyed to wild, unenclosed and undeveloped lands into its prescriptive easement presumption framework.

iii. Use Based Exceptions: Road Stories

A third broad category of exceptions to the PPAU, generally found in Western states, focuses on the existence of a road on the portion of the servient estate where the easement is claimed and the history of that road.[435] In some

433. Alexandra Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 COLO. L. REV. 283, 310–314, 323–24 (2006).

434. *Id.* at 324.

435. SINGER, *supra* note 44, § 5.4; 7 THOMPSON, *supra* note 46, § 60.03(b)(6)(viii); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (AM. L. INST. 2000).

states, namely, Idaho,[436] Nebraska,[437] Nevada,[438] Utah,[439] and Washington,[440] a relatively stable counter-presumption of permissive use arises when an easement is claimed over a road providing vehicular ingress and egress and the road was either (a) built by the alleged servient estate owner or (b) predated the arrival of the prescriptive easement claimant, and (c) the claimant's use does not prevent the owner from using the road or driveway.[441] On the other hand,

436. Chen v. Conway, 829 P.2d 1355, 1357, 1359 (Idaho Ct. App. 1991) (stating initial presumption of adverse use when there is no evidence as to how use began, but stating that when owner builds a driveway over property for his own use and convenience and use of it by others does not interfere with the owner's use, the latter use is presumed to be permissive).

437. Melendez v. Holling, 927 N.W.2d 834, 840–41 (Neb. Ct. App. 2019) (articulating general presumption of adverse use once claimant has shown open and notorious use over the 10 year prescriptive period, but, relying on *Feloney v. Baye*, applying presumption of permissive use when owner has opened or maintained a roadway for his or her own use and claimant uses it in common without interfering with owner's use); Feloney v. Baye, 815 N.W.2d 160, 167 (Neb. 2012) (recognizing exception to presumption of adversity for non-interfering use in common of road or right of way opened or maintained by servient estate owner for his own use; *i.e.*, "when a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to presumed to be permissive").

438. Wilfon v. Cyril Hampel 1985 Trust, 781 P.2d 769, 770–71 (Nev. 1989) (presumption of adverse use when claimant creates or establishes a road on another's property, but presumption of permissive use when road is established by landowner/servient estate owner and paving of road by claimant is first hostile assertion of easement); Turrillas v. Quilici, 303 P.2d 1002, 1003 (Nev. 1956) (general presumption of adverse use, but presumption of permissive use for roads established or maintained by landowner for his own use when claimant's use does not interfere based on assumption that claimant's non-interfering use is result of neighborly accommodation).

439. Van Denburgh v. Sweeney Land Co., 315 P.3d 1058, 1060 (Utah Ct. App. 2013) (stating that use is presumptively permissive when owner creates a roadway and another uses it without damage). *But see* Harrison v. Spah Fam. LTD, 466 P.3d 107, 118–19 (Utah 2020) (stating traditional PPAU and finding that record owner failed to rebut that presumption because road at issue was created by *claimants' predecessor*, not record owner, and without record owner's knowledge or authority, there was no evidence that claimants or predecessor ever accepted the record owner's permission, and record owner's grant of permission was only for "marketing purposes" and thus claimants' subsequent use for residential access was not *permissive);* Homer v. Smith, 866 P.2d 622, 626–27 (Utah Ct. App. 1993) (observing that law presumes use of another's property is adverse if elements of prescriptive easement are otherwise satisfied and declining to apply "presumption of permissiveness created when a person 'opens a way' across his or her property and another uses it without causing damage" based on trial court's implicit rejection of landowner's factual assertion that it "opened a way" across its property).

440. Gamboa v. Clark*,* 348 P.3d 1214, 1217–18 (Wash. 2015) (stating broad presumption of permissive use applicable in three factual scenarios: (1) unenclosed land; (2) enclosed or developed land but when it is "reasonable to infer that use was permitted by neighborly sufferance or acquiescence;" and (3) owner of property "created or maintained a road and his or her neighbor used the road in a non-interfering manner").

441. *See infra* notes 436–440 and accompanying text.

courts in Alaska[442] and Nevada[443] start with a presumption of permissive use when there is a preexisting road but return to a presumption of adverse use when the road was not built by the alleged servient estate owner and the claimant used the road as the only means of ingress and egress to the dominant estate.[444] Courts in Colorado follow yet another road story presumption of permissive use when a road was constructed by the alleged servient estate owner (but was not of preexisting origin) and was then used by others.[445]

Finally, courts in Oregon start with a general presumption of adverse use when the claimant has no particular relationship to the landowner (i.e., is a stranger)[446] but then apply a counter-presumption of permissive use when the claimant engages in non-exclusive use of a road that was constructed by the landowner or is of unknown origin ("the common road" exception),[447] and yet

442. McDonald v. Harris, 978 P.2d. 81, 85 (Alaska 1999) (adopting view that use of a road on another's land is presumptively permissive, but holding that presumption did not apply when road was not built by the landowner and had been used for many years as the only means of access to the claimed dominant estate); McGill v. Wahl, 839 P.3d 393, 397–98 (Alaska 1992) (holding that it would be inappropriate to presume that claimants were acting as "merely permitted users of a roadway" where "roadway was not established by the owner of the servient estate for its own use but was for many years the only means of passage to the dominant estate").

443. Richardson v. Brennan, 548 P.2d 1370, 1372 (Nev. 1976) (stating that presumption of permissive use does not apply when road was not established by owner/servient estate and was for many years the only means of ingress and egress to dominant estate); Stix v. La Rue, 368 P.2d 167, 168–69 (Nev. 1962) (stating that presumption of adverse use when road was built by unknown persons, over public domain, and was once the only travelled way to dominant estate and remains the only practicable way to dominant estate).

444. *E.g.*, *McDonald*, 978 P.2d at 85.

445. *See* Durbin v. Bonanza Corp., 716 P.2d 1124, 1129–30 (Colo. Ct. App. 1986) (stating that when landowner constructs a passageway at its own expense and it is thereafter used by others, the use is presumed to be permissive at inception, but holding that unexplained use of road in dispute was adverse because road was in existence long before alleged servient owner acquired property and there was no evidence who constructed road). *See also* Weisiger v. Harbour, 62 P.3d 1069, 1072 (Colo. App. 2002) (stating that use of an easement—in this case, a mining road—"for more than eighteen years entitles the holder to the presumption that use was adverse") (citing Trueblood v. Pierce, 179 P.2d 671 (1947)). *But see* Bomareto v. Snow, 516 P.2d 443, 444 (Colo. Ct. App. 1973) (stating that presumption of adverse use arising from 18 years of unexplained use would not apply to joint use of driveway with owner of land, but holding that it did apply to claimant's use of drive solely for access to claimant's property).

446. Albany & E. R.R. Co. v. Martell, 469 P.3d 748, 751 (Or. 2020); Rendler v. Lincoln Cnty., 709 P.2d 721, 726 (Or. 1985).

447. Wels v. Hippe, 385 P.3d 1028, 1035–36 (Or. 2016), *modified on reconsideration*, 388 P.3d 1103 (Or. 2017). In *Wels*, the court stated that in "ordinary cases" in which the claimant is a "stranger to the landowner . . . it makes sense to assume that obvious use of owner's property is adverse to his

recognize that this counter-presumption can be rebutted if the claimant offers clear evidence that the use of road by the claimant interfered with the landowner's use of the road or occurred under a claim of right.[448] Determining whether the general presumption or this counter-presumption applies can be a difficult task for Oregon courts as demonstrated by a recent case in which the trial court applied the general presumption of adverse use, the court of appeals reversed finding it inapplicable, and the Oregon Supreme Court reversed the court of appeals and reinstated the trial court judgment upholding a prescriptive easement claimed by lot owners and residents in a subdivision across a private railroad crossing, finding the general presumption of adverse use was perfectly suited for the facts of that case.[449]

One problem with founding a powerful counter-presumption of permissive use on the mere existence of a preexisting road either constructed by the alleged servient estate owner or of unknown origin is that many prescriptive easement claims involve such improvements. If courts were to follow a general presumption that any use by a neighbor of a preexisting road is permissive, a large percentage of prescriptive easement claims would fail, even those involving open and notorious use for long periods of time exceeding the statutory period.

There may be some method, however, to courts' highly contextualized, presumption-framing inquires in these road story cases. Generally speaking,

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or her rights," but that this rule does not apply "when the nature of the land or relationship between the parties is such that the use of the owner's property is not likely to put the owner on notice of the adverse nature of the use." *Id.* at 1035–36. It then specified its road use exception: "when a claimant uses a road that the landowner constructed or that is of unknown origin, the claimant's use of the road—no matter how obvious, does not give rise to a presumption that the use is adverse to the owner." *Id.* at 1036. The Oregon Supreme Court recently labelled this counter-presumption the "common road" exception in *Albany & E. R.R. Co. v. Martell*. 469 P.3d at 751.

448. *Wels*, 385 P.2d at 1036.

449. *See* Albany & E. R.R. Co. v. Martell, 445 P.3d 319, 324–327 (Or. App. 2019) (reversing trial court conclusion that presumption of adversity arose); *Albany & E. R.R. Co*., 469 P.3d at 752–56 (reversing court of appeal decision and reinstating trial court determination that presumption of adversity applies because (1) railroad's predecessor knew from 1928 deed that had agreed to construct a private grade crossing and connected to a private road; (2) there was no evidence that railroad's predecessor ever gave permission to use crossing; (3) mistaken belief that crossing was public did not occur until after 10 year prescriptive period had run; and (4), even so, railroad's mistaken belief that crossing was public could not entitle railroad to presume that use was permissive). *See also* Waters v. Klippel Water, Inc., 464 P.3d 490, 493–96 (Or. App. 2020) (applying *Wels* framework and finding that claimants did not overcome the presumption that their use of a preexisting road was permissive either by showing that their use interfered with record owner's use or by communicating belief they were using the road under a claim of right).

the courts seem concerned with two problems. The first is inconsistent use: Is a claimant's use of a preexisting road blocking or preventing the alleged servient estate owner from using that road as well? If the answer is yes, then perhaps a court should presume that the servient estate owner has inquiry notice of an adverse use that so obviously challenges the owner's right to exclude non-owners. If the answer is no, a presumption of neighborly permissiveness is easier to accept. The second problem is reasonable necessity. When a claimant has only one practical means of accessing his or her property and that route crosses the putative servient estate, then perhaps a court should charge that owner with a certain degree of situational awareness—to be cognizant, that is, that the claimant's use of the road is not merely a matter of occasional convenience but is essential to the claimant's ability to exercise the normal prerogatives of ownership on his or her estate.

As the preceding interpretation of road story cases requires a considerable amount of speculation, the Restatement Fourth reporters should proceed with caution in this area. Perhaps the most sound approach would be to acknowledge a series of converging trends, particularly in rural and Western states. These trends hold that when a claimant seeks a prescriptive easement over a road that was built by the alleged servient estate owner or is of preexisting origin, the claimant's use will be presumed to be permissive unless (i) the claimant can show that its use prevented the owner from using the contested road or a portion of it, or (ii) the road provided the only practical means of access to the alleged dominant estate. If such a rule were extended to the rest of the United States, however, it could severely hamstring the utility of prescription nationwide and result in the PPPU becoming the de facto dominant presumption in U.S. prescriptive easement law. As this would result in a major change in the law, the Restatement Fourth should probably avoid this approach and focus on carving out more narrowly tailored, less radical exceptions to the PPAU.

iv. Social Exceptions: Friendly, Cooperating Neighbors and Members of Communities with Customs of Neighborly Accommodation

The final category of exceptions to the PPAU emerges from the particular character of the social relationship that exists between the claimant and the owner of the alleged servient estate or their predecessors. In a number of states,

including the District of Columbia,[450] Illinois,[451] Michigan,[452] Montana,[453] New Jersey,[454] New York,[455] and Washington,[456] courts apply a counter-presumption

450. Chaconas v. Meyers, 465 A.2d 379, 382–84 (D.C. 1983). Rather than represent a clear counter-presumption of permissive use, however, the decision in *Chaconas* arguably turned on particular evidence of implied permission that rebutted the PPAU; namely frequent face-to-face encounters between the landowners and the claimants when the latter were taking out their garbage using a right of way across a portion of defendant's property to reach a public alley. *Id.* at 383.

451. Deboe v. Flick, 526 N.E.2d 913, 915 (Ill. App. Ct. 1988) (evidence of friendly relations overcomes presumption that use of adjoining driveway was adverse); Nationwide Fin., LP v. Pobuda, 21 N.E.3d 381, 395 (Ill. 2014) (citing *Deboe* for the rule that "evidence of a neighborly relationship gives rise to a presumption of permissive use," but noting that rule is inapplicable to the facts at issue).

452. Reed v. Soltys, 308 N.W.2d 201, 203–04 (Mich. Ct. App. 1981) (holding that evidence of long-standing cooperation and accommodation between adjoining property owners in use of driveway that straddled boundary line established that use was permissive, not adverse). *See also* Wilkinson v. Hutzel, 106 N.W. 207, 208 (Mich. 1906*);* Milewski v. Wolski, 22 N.W.2d 831, 832 (Mich. 1946); Frandorson Properties v. NW Mut. Life Ins. Co., 744 F. Supp. 154, 157 (W.D. Mich. 1990).

453. Brown v. Tintinger, 801 P.2d 607, 609–10 (Mont. 1990) (testimony of prior owner that he was good friends with claimant and that claimant "definitely" had his permission to use road overcame presumption of adversity), *overruled on other grounds by* Wareing v. Schreckendgust, 930 P.2d 37 (Mont. 1996); Ewan v. Stenberg, 541 P.2d 60, 63 (Mont. 1975) (neighborly cooperation between friendly ranchers prevented acquisition of prescriptive right to trail cattle). But as noted *infra* notes 467–471, other Montana Supreme Court decisions sometimes apply the general PPAU and others apply a much narrower counter-presumption of permissive use only when there is evidence of a broader customary practice of neighborly accommodation in the locality.

454. Leach v. Anderl, 526 A.2d 1096, 1102–03 (N.J. Super. Ct. App. Div. 1987) (stating that presumption rebutted by evidence of neighborly relations between parties). *See also* Yellen v. Kassin, 3 A.3d 584, 590 (N.J. Super. Ct. App. Div. 2010) (finding that neighbors' use of a driveway was not hostile and thus did not establish the requisite element of hostility).

455. Bekkering v. Christiana, 119 N.Y.S.3d 622, 626 (N.Y. App. Div. 2020) (acknowledging the existence of a counter-presumption whereby "permission can be inferred when the relationship between the parties is one of neighborly cooperation and accommodation, in which case no presumption of hostility will arise" in the context of an alleyway separating businesses that one business sought to use as an exit-only passage from a drive-through window); Schwengber v. Hultenius, 74 N.Y.S.3d 120, 121–22 (N.Y. App. Div. 2018) (recognizing possible application of inference of permissive use based on "relationship of neighborly cooperation and accommodation" and reversing summary judgment in favor of prescriptive easement claimant in light of conflicting evidence supporting inferences of both hostility and permissive use); Gulati v. O'Leary, 125 A.D.3d 1231, 1233–34 (N.Y. App. Div. 2015) (recognizing same possible inference of permissive use based on neighborly cooperation and accommodation and remanding for new trial); Hassinger v. Kline, 457 N.Y.S.2d 847, 847–48 (N.Y. App. Div. 1983) (holding that "neighborly relationship between plaintiffs, their predecessors in title, and defendants' predecessors in title, created an implication that the use of the disputed roadway was permissive"). *But see* Meyers v. Carey, 904 N.Y.S.2d 824, 825 (N.Y. App. Div. 2010) (applying traditional presumption of hostile use in absence of any evidence of neighborly accommodation or permission during 34-year period between time when claimants' parents purchased alleged dominant estate and when current landowner purchased alleged servient estate).

456. Gamboa v. Clark, 348 P.3d 1214, 1220 (Wash. 2015).

of permissive use (or least negate the PPAU) when evidence suggests some pattern of "neighborly accommodation," that is, when the current parties to the prescriptive easement dispute or their predecessors, though unrelated by family ties, were friendly neighbors and cooperated in the maintenance and usage of the easement.[457]

One should not, however, overstate the reach of this exception. Some courts that mention the neighborly accommodation concept may simply be responding to prescriptive easement claims by looking closely at whether the alleged servient estate owner rebutted the PPAU with sufficient evidence of neighborly accommodation to prove implied consent or permission.[458] Some holdings may be explained merely by unique facts such as driveways straddling property lines.[459] Moreover, courts in a few states, namely California,[460]

457. *E.g., id.* at 1218–19.

458. *Compare* Chaconas v. Meyers, 465 A.2d 379, 382–85 (D.C. 1983) (holding that evidence of "neighborly accommodation," i.e., alleged servient owner maintaining friendly contact with user and restraining his dog so that user could pass over his property, was sufficient to rebut the presumption of adverse use and hence use could not ripen into a prescriptive easement), *and* Boumis v. Caetano, 528 N.Y.S.2d 104, 105 (N.Y. App. Div. 1988) (presumption of adverse use rebutted by evidence that plaintiff's predecessor had a relationship of cooperation and accommodation with defendants and had asked for and received permission to use defendant's part of alley), *with* Meyers v. Carey, 904 N.Y.S.2d 824, 825 (N.Y. App. Div. 2010) (rejecting assertion of neighborly accommodation exception on ground that no evidence was offered by servient estate owner to prove that use by claimants' parents was permissive during 34 year period and thus use of preexisting stone driveway was presumed to be hostile).

459. Deboe v. Flick, 526 N.E.2d 913, 915 (Ill. App. Ct. 1988); Reed v. Soltys, 308 N.W.2d 201, 203–04 (Mich. 1981).

460. Larsson v. Hurst, No. F046355, 2005 WL 2293034, at *3 (Cal. Ct. App. 5 Dist. Sept. 21, 2005) (refusing invitation to clarify definition of neighborly accommodation as "a legal concept" and noting that "the parameters of neighborly accommodation depend on the facts and circumstances specific to each case"); Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 588 (Cal. 1984) (stating that whether alleged prescriptive use is hostile or "a matter of neighborly accommodation" is "a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties").

Maryland,[461] Massachusetts,[462] and Colorado,[463] have refused invitations to carve out a broad counter-presumption of permissive use for alleged neighborly accommodation, especially, as a Colorado court noted, in the absence of any evidence of "customs in the neighborhood for neighborly accommodation,"[464] or because, as a California decision recently noted, neighborly accommodation is "best defined relative to the norms and expectations of the specific community in question."[465]

With those caveats in mind, this exception remains significant because it responds to a common argument raised by academic prescriptive easement abolitionists and reformers—the notion that prescription in general, and the PPAU in particular, discourages landowners from being neighborly.[466] Should the Restatement Fourth include a broad neighborhood accommodation

461. Mavromoustakos v. Padussis, 684 A.2d 51, 54–56 (Md. Ct. Spec. App. 1996) (rejecting argument that record owner's assertion of implied permission was an "explanation" for claimant's placement of dumpster on servient lot and use of lot for ingress and egress and delivery of merchandise and trash removal and declining to adopt the "neighborly accommodation" exception as used in District of Columbia); Turner v. Bouchard, 32 A.3d 527, 537 (Md. Ct. Spec. App. 2011) (following *Mavromoustakos* and rejecting argument that there is a "heightened burden of proof between neighbors" and accepting notion that traditional PPAU will not be "overcome by allegations of neighborly accommodation").

462. Lantern Lane House, Inc. v. Hummel, 83 N.E.3d 197, 199 (Mass. App. Ct. 2017) (rejecting invitation to apply "doctrine of neighborly accommodation" and "conclude that evidence of a friendly or close relationship between the parties, without more, requires an inference of permissive use," and thus applying traditional PPAU and looking to specific facts). *But see* Stearns v. Risso, No. 15 MISC. 000199 (KCL), 2019 WL 1526860, at *7–9 (Mass. Land Ct. Apr. 5, 2019) (following *Lantern House* and acknowledging that Massachusetts does not have a "per se doctrine of neighborly accommodation," but noting that "the nature of the parties relationship with each other is a factor, and a context in which other factors are to be evaluated," in determining whether use was impliedly permitted or adverse, and holding that all the evidence pertaining to use of a route through defendant's cranberry farm by all users, including neighboring bog owner claimants, was cooperative, mutually supportive, and with implied permission and thus not adverse, and similarly rejecting defendant's counterclaim of prescriptive easement of horseback riding over cart path on plaintiff's property based on implied permission).

463. LR Smith Invs., LLC v. Butler, 378 P.3d 743, 750 (Colo. App. 2014) (declining to recognize exception based on custom of neighborly accommodation, noting that "the mere fact that the owners of one property may have used their neighbor's land for a certain purpose does not constitute a custom in the neighborhood of neighbors using each other's land for that purpose," and denying that Colorado Supreme Court has ever adopted the doctrine of "neighborly accommodation" to proscribe the traditional presumption of adverse use when all the other elements of prescription have been established).

464. *LR Smith Invs.*, 378 P.3d at 749.

465. Larsson v. Hurst, No. F046355, 2005 WL 2293034, at *3 (Cal. Ct. App. 5 Dist. Sept. 21, 2005) (citing Friends of the Trails v. Blasius, 78 Cal. App. 4th 810, 812 (2000)).

466. *See supra* notes 125–27, 168–71 and accompanying text.

exception in the PAUSE framework that would require courts to make a threshold determination about whether to apply the exception in almost every case? Or would the interests of transparency and judicial efficiency be better served in this context by simply choosing one of the more generalized pure presumptions (PPAU or PPPU) and encouraging courts to do their real work in deciding whether the non-favored party has rebutted the starting presumption? This Article recommends an intermediate position.

The Restatement Fourth should reject a broad neighborly accommodation exception and instead adopt a narrow neighborhood accommodation exception modeled on a line of cases decided by the Montana Supreme Court. In some decisions, it is true, the Montana Supreme Court simply recognizes and applies the PPAU.[467] However, in a 1983 decision, *Rathbun v. Robson*, the court adopted a narrow counter-presumption of permissive use applicable when the alleged servient estate owner proves a *community custom* of neighborly accommodation in the *particular locality* from the moment the alleged prescriptive use began.[468] Although several other subsequent Montana decisions, some of which may have been overruled, appear to employ a general

467. Lemont Land Corp. v. Rogers, 887 P.2d 724, 727–28 (Mont. 1994); Parker v. Elder, 758 P.2d 292, 294–95 (Mont. 1988), *appeal after remand,* 836 P.2d 1236 (Mont. 1992); Thomas v. Barnum, 684 P.2d 1106, 1110 (Mont. 1984), *overruled by* Warnack v. Coneen Fam. Tr., 879 P.2d 715, 723 (Mont. 1994) (holding that prescriptive easement cannot be established by long, continued, unexplained use alone; claimant still has to prove all of the elements of his claim, including that the use was adverse).

468. 661 P.2d 850, 852 (Mont. 1983). In *Rathbun*, the Montana Supreme Court noted that "there existed an understanding among landowners that permission was not required every time a person needed to cross his neighbor's land. Permission was automatic as long as the individual closed the gates and respected his neighbor's property." *Id.* Hence, the court in *Rathbun* observed, "[e]vidence of this local custom, without more, was sufficient to establish permissive use." *Id.* On other hand, the court in *Rathbun* also considered other later evidence of permissive use and control exercised by the landowners, indicating that the court may have simply determined that the traditional "presumption of adverse use was rebutted." *Id.* In a later decision, *Warnack,* 879 P.2d at 723, the Montana Supreme Court also acknowledged that early homesteaders in the surrounding area developed a common practice of allowing others to cross their lands and that such evidence can support a presumption of permissive use at its inception. However, the Montana Supreme Court did not apply this particular presumption in that decision as it remanded the case for a determination as to whether the claimants could prove the other necessary prima facie elements of a prescriptive easement. *Id.* at 723–24. *Warnack* is often cited by Montana courts for the proposition that a claimant seeking to establish a prescriptive easement must prove each element of the claim, including that the use at issue is adverse. Wareing v. Schreckendgust, 930 P.2d 37, 43 (Mont. 1996); Unruh v. Task, 896 P.2d 433, 438 (Mont. 1994). However, Montana courts also hold that once a claimant proves the prima facie elements, the burden shifts to the landowner to show the use was permissive, not adverse. *Wareing*, 930 P.3d at 45.

counter-presumption based on evidence of friendly neighborly relations,[469] in other subsequent cases the Montana Supreme Court applied the *Rathbun* rule and particularly looked for evidence of a local custom of landowners allowing neighbors to use parts of their land in determining whether to apply a counter-presumption of permissive use.[470] In another relatively recent decision, the same court affirmed a prescriptive easement over a primitive road after identifying evidence of a local custom that actually supported the claimant's alleged prescriptive use.[471] At least one Washington decision frames a counter-presumption of permissive use in terms of customary practice as well.[472]

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469. *See* Brown v. Tintinger, 801 P.2d 607, 609–10 (Mont. 1990) (testimony of prior owner that he was good friends with claimant and that claimant "definitely" had his permission to use road overcame presumption of adversity), *overruled by Wareing*, 930 P.2d at 37 (changing burden of proof for establishing a prescriptive easement from a preponderance of the evidence to clear and convincing evidence); Ewan v. Stenberg, 541 P.2d 60, 67 (Mont. 1975) (neighborly cooperation between friendly ranchers prevented acquisition of prescriptive right to trail cattle).

470. *Compare* Greenwalt Fam. Tr. v. Kehler, 885 P.2d 421, 425 (Mont. 1994) (evidence from numerous witnesses of "neighborhood policy" of allowing neighbors to cross the edges of neighboring fields to gain access to their property established permissive use and thus prevented acquisition of prescriptive rights); Pub. Lands v. Boone & Crocket, 856 P.2d 525, 528 (Mont. 1993) (affirmative evidence of long-standing local custom of neighborly accommodation can negate the PPAU), *and* Keebler v. Harding, 807 P.2d 1354, 1358 (Mont. 1991) (evidence of local of neighborly custom, without more, can be sufficient to establish permissive, rather than adverse, use), *with* Lemont Land Corp. v. Rogers, 887 P.2d 724, 728–29 (Mont. 1994) (presumption of adverse use not overcome where there was no affirmative evidence of local custom). The source of this line of Montana authority stressing the importance of a broad and well understood local custom of neighborly accommodation at the inception of use is *Taylor v. Petranek*, 568 P.2d 120, 123 (Mont. 1977) (finding that where both plaintiff's and defendant's witnesses testified that initial homesteaders in the area developed a "common practice of allowing others to cross their lands" to reach a town, this evidence was sufficient to "support a use permissive in its inception and not under a claim of right").

471. In *Brown and Brown of MT, Inc. v. Raty*, 289 P.3d 156 (Mont. 2012), the Montana Supreme Court stated the general presumption of adverse use, acknowledged that "[u]se of a neighbor's land based on neighborly accommodation or courtesy is not adverse," *id.* at 162, but then rejected the landowner's defense of neighborly accommodation by observing that the evidence showed that the claimants only notified the landowner of their planned use of the primitive road in dispute for cattle trailing purposes so that the landowner could move its herd of cattle out of the way and avoid any mixing of the two herds. *Id.* at 163. Indeed, the court noted that this practice of prior notification was, just as in *Wareing*, 930 P.2d at 45, consistent with community custom but not indicative of implied permission. *Brown and Brown*, 289 P.3d at 163. In *Brown and Brown*, the court also found that prior to 2004 the landowner impliedly acquiesced in, rather than permitted, the claimants' use of the road and then after 2004 received express notice of a claim of right when one of the claimant's cut a gate and claimants generally refused the landowner's request to ask for permission to use the road. *Id.*

472. Crites v. Koch, 741 P.2d 1005, 1009–10 (Wash. 1987) (common practice of farmers to cross and park equipment on neighbors' fields was neighborly accommodation and did not give rise to prescriptive rights). *See also* Kunkel v. Fisher, 23 P.3d 1128, 1130 (Wash. App. 2001) ("A permissive

It is noteworthy, however, that in a recent prescription easement case involving alleged neighborhood accommodation, *Lyndes v. Green,*[473] the Montana Supreme Court appears to have rejected application of any initial framing device and instead focused on probing all of the particular facts and relationships in the context of the PPAU. In that case, the claimants asserted that they and their predecessors had used a ranch road that crossed a neighboring landowner's property to move cattle and engage in other ranching operations regularly since the early days of the settlement of Montana.[474] The servient estate owner's predecessors did not challenge or protest this use because they purportedly wanted to get along and be good neighbors. The surrounding neighbors believed the claimants had a legal right to cross the land in dispute.[475] Eventually, the Montana Supreme Court affirmed the trial court's ruling that the claimants had established a prescriptive easement based on open and notorious use of the access road for over forty years.[476]

In its ruling in *Lyndes*, the Montana Supreme Court acknowledged the traditional presumption of adverse use,[477] and the limited counter-presumption that "land use based upon 'mere neighborly accommodation' is not adverse use and cannot ripen into a claim for a prescriptive easement."[478] Ultimately, however, the court resolved the tension between these conflicting presumptions by choosing to frame the dispute through the lens of the presumption of adversity, observing that "a landowner's *passive acquiescence* to another's use of his land is not evidence of permissive use,"[479] and remarking that "possession may be adverse even though the owner does not interfere with entry and the possessor understands there will be no future interference with his

use may be implied in 'any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.'").

473. 325 P.3d 1225, 1230–31 (Mont. 2014).

474. *Id.* at 1228.

475. *Id.* at 1231.

476. *Id.* at 1229–32.

477. *Id.* at 1229–30.

478. *Id.* at 1230 (citing Pub. Lands Access Assoc. v. Boone & Crockett Club, 856 P.2d 525, 528 (Mont. 1993)).

479. *Id.* (emphasis added). Many Montana decisions repeat this same axiom in various formulations. Brown and Brown of MT, Inc. v. Raty, 289 P.3d 156, 162 (Mont. 2012) ("implied acquiescence is not the same as permission"); Cremer v. Cremer Rodeo Land & Livestock Co., 627 P.2d 1199, 1201 (Mont. 1981) (same and noting "possession may be adverse even though the owner does not interfere with entry and the possessor understands that there will be no future interference with his possession"). Curiously, the *Cremer* decision, the source of this line of statements, was an adverse possession case. *Id.*

possession."[480] In effect, the court concluded that the neighborly accommodation exception did not apply because of a cluster of relevant facts that spoke to the particular physical and social geography of this dispute: (1) use of the road began long before the current alleged servient estate owner acquired the property; (2) all of the prior owners knew of the claimants' use and failed to object; (3) permission was never sought or given; and (4) prior landowners of the potential servient estate believed the claimants had the right to access their land.[481] As the Montana Supreme Court observed in conclusion:

> The fact that these landowners did not fight [the claimants] over the use of road because they wanted to get along and be good neighbors does not transform [the dominant estate owner's] claim into one based upon mere neighborly accommodation. It is established that the proponent of a prescriptive easement and the owner of the servient tenement can cooperate and avoid conflict without defeating the claim of prescriptive right. To the contrary, persons in such a situation should be commended for exhibiting cooperation rather than confrontation.[482]

In the particular, but probably not unique, relational circumstances of *Lyndes*, the court thus found that the normative goal of promoting neighborly cooperation was best served with the recognition of a prescriptive easement rather than its denial.[483] In a yet more recent decision, the Montana Supreme Court applied the flexible framework of *Lyndes* to reject a neighborhood accommodation defense in a case involving residential lots in a more developed area, noting that the claimants travelled across the road in dispute numerous times over five years and that the landowner did not object to or address the claimants' use at any time, and finding no actual evidence to support the landowner's claim she allowed the use as a matter of neighborly accommodation.[484]

Next door in Washington, however, courts have taken a different approach. In *Gamboa v. Clark*,[485] the Washington Supreme Court recently adopted a counter-presumption of permissive use based on neighborhood

480. *Lyndes*, 352 P.3d at 1230 (citing Heller v. Gremaux, 53 P.3d 1259 (Mont. 2002)). Once again, the source of this statement is ultimately *Cremer*, 627 P.2d at 1201.

481. *Lyndes*, 352 P.3d at 1230.

482. *Id.* at 1231 (citations omitted).

483. *Id.* at 1230–31.

484. Walker v. Phillips, 427 P.3d 92, 100–01 (Mont. 2018).

485. 348 P.3d 1214 (Wash. 2015).

accommodation, which complements its other counter-presumptions of permissive use applicable to unenclosed land and roads created or maintained by a landowner that the claimant uses "in a noninterfering manner."[486] This third counter-presumption focuses on "enclosed or developed land cases in which 'it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.'"[487] The court in *Gamboa* rationalized this presumption in terms of both its past precedents and a desire to incentivize landowners to allow neighbors to use their roads for convenience and not punish them for acts of neighborly courtesy.[488] Subsequent appellate court decisions demonstrate that application of this new *Gamboa* presumption of permissive use can wipe out seemingly strong prescriptive easement claims, particularly given that "what constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar."[489]

In another recent decision that mirrors the *Gamboa* approach, the Louisiana Supreme Court announced, albeit tentatively, a new presumption of permissive use applicable to claimed acquisition of predial servitudes by prescription when the parties are neighbors and there is an assertion of neighborly indulgence.[490] In that case, the court also expressed concerns about discouraging neighborly accommodation.[491]

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486. *Id.* at 1218.

487. *Id.* at 1217 (quoting Roediger v. Cullen, 175 P.2d 669 (Wash. 1946)).

488. *Id.* at 1219–20.

489. Tiller v. Lackey, 431 P.3d 524, 534 (Wash. Ct. App. 2018) (quoting *Gamboa*, 348 P.3d at 1221). In *Tiller*, the court held that the trial court properly applied the *Gamboa* presumption of permissive use based on a reasonable inference of neighborly accommodation but reversed the trial court's finding that the claimants had rebutted the presumption despite evidence of the claimants' subjective belief they had a right to use private street, the landowners' failure to restrict others from using the street, potential unfairness to third parties, alleged constructive knowledge of the use on the part of the landowners, and the claimants' contribution of labor and materials to improve and maintain the street. *Id.* at 535–37. *See also* Workman v. Klinkenberg, 430 P.3d. 716, 719, 721–22 (Wash. Ct. App. 2018) (holding that claimants failed to present evidence to rebut *Gamboa* presumption of permissive use despite evidence that claimant family had shared in cost to construct and maintain patio and stairway between respective decks on adjoining ocean front properties and that the parties jointly enjoyed patio and stairway for recreational use).

490. Boudreaux v. Cummings, 167 So. 3d 559, 563–64 (La. 2015) (holding that "under limited circumstances where 'indulgence' and 'acts of good neighborhood' are present," the possessor's acts of possession are presumed to have occurred with the owner's "tacit permission," but also "strictly" limiting holding to "the facts before us").

491. *Boudreaux*, 167 So. 3d at 563 (quoting A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 139, in 4 LOUISIANA CIVIL LAW TREATISE (3d ed. 1997) and stating that acts of toleration must not be considered as acts of adverse possession otherwise "landowners would be compelled to object to

It may be impossible to rationalize all of these divergent judicial responses to the assertion of a presumption of permissive use based on allegations of neighborly accommodation. If the Restatement Fourth reporters were to adopt a formal exception to the PPAU based on merely some evidence of or an inference of neighborly accommodation set at a "fairly low bar" as in Washington,[492] this could, just like a broad "road story" exception, undermine the utility of the PPAU across much of the United States. After all, there will be countless cases in which some evidence of neighborly accommodation is produced, even though the meaning of such evidence is unclear and will often be met with contradictory evidence that the accommodation only amounted to acquiescence to (and permission of) a claimant's non-interfering use.

Consequently, this Article recommends that the Restatement Fourth draw a much narrower neighborhood accommodation exception to the PPAU, one that entitles a record owner to a counter-presumption of permissive use *only if* that owner introduces evidence of a well-established *community custom* of neighborly accommodation in the *particular locality*. The evidence of neighborly accommodation would have to extend beyond the individual parties and their predecessors to the broader community in which the dispute arose. A community custom in the locality version of the neighborhood accommodation exception would be consistent with pronouncements of the Restatement Fourth reporters that the law of possession should be grounded in well observed social norms.[493] A narrow community custom exception of this nature would also not overwhelm the PPAU and would be manageable by courts. It would probably be most useful in rural, largely undeveloped areas of the Western United States where land settlement and development occurred relatively late and where parties may be able to produce evidence of community custom at the time settlement or land development began or at least when the alleged prescriptive use began.

D. Uncertain Presumptions

Finally, in a few states, courts seem to be relatively unclear or inconsistent when it comes to addressing the element of adversity in a prescriptive easement case. In Oklahoma, for instance, courts state that they will resolve all doubts

innocent and occasional invasions"). For criticism of this position, see Lovett, *supra* note 36, at 693–700.

492. *Gamboa*, 348 P.3d at 1221.

493. RESTATEMENT (FOURTH) OF PROPERTY, Vol. 1, Div. II, Ch. 1, § 1.2 cmts. b–e, reporter's note, at 2–12 (AM. L. INST., Tentative Draft No. 1, Mar. 27, 2020), discussed *supra* notes 25–26 and accompanying text.

about the adverse use element in favor of the underlying landowner because a prescriptive easement claimant generally bears the burden of proof on elements of its claim, but then they articulate a number of other highly particularized rules and engage in ad hoc decision-making.[494] North Dakota courts follow a similar approach, stressing that claimants must prove adverse use and that the general burden of proof rests on prescriptive easement claimants and also noting that fences and gates are strong indications of permission.[495] Delaware courts also stress that prescriptive easements are disfavored and that a prescriptive easement claimant must prove that use is exclusive and adverse by clear and convincing evidence.[496]

Connecticut courts lean in a different, more claimant-friendly direction, first stating that they do not apply a general presumption of adversity and thus look to the facts and circumstances of each particular prescriptive easement case, but also observing that open and notorious use of property during the prescriptive period will support "an inference" that use was adverse.[497] Furthermore, as the Connecticut Supreme Court recently observed, when a defendant-landowner asserts permission as a defense to a prescriptive easement claim, the burden rests on that party to prove that defense because "a contrary rule would unfairly 'charge a party with proving a negative.'"[498]

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494. James v. Bd. of Cnty. Comm'rs of Muskogee, 978 P.2d 1002, 1004 (Ok. Civ. App. 1998) ("The burden of proof is on one claiming an easement by prescription, but the burden is shifted to the opposite party where there is a showing of open, visible, continuous and unmolested use of a roadway for a sufficient time to acquire an easement by adverse use. Under this rule, the use will be presumed to be under a claim of right and the owner of the servient estate must rebut the presumption of easement by showing that the use was permissive." (citations omitted)); Willis v. Holley, 925 P.2d 539, 540–41 (Ok. 1996). Other Oklahoma authority suggests there is a presumption of permission or implied consent when the claimed easement traverses property that has been cleared and enclosed by a fence. Mefford v. Sinclair, 859 P.2d 1127, 1130 (Ok. Civ. App. 1993).

495. Fischer v. Berger, 710 N.W.2d 886, 889 (N.D. 2006); Mohr v. Tescher, 313 N.W.2d 737, 739–40 (N.D. 1981); Berger v. Berger, 88 N.W.2d 98, 103 (N.D. 1958).

496. Dewey Beach Lions Club v. Longanecker, 905 A.2d 128, 134–35 (Del. Ch. 2006). Elsewhere in *Dewey Beach*, the court mentions other possible grounds for a presumption of permissive use, including roads and neighborly or friendly use of land. *Id.* at 136.

497. Slack v. Green, 984 A.2d 734, 745 n.7 (Conn. 2009); Reynolds v. Soffer, 459 A.2d 1027, 1029–30 (Conn. 1983) (stating that no presumption of permissive use to be overcome by claimant, even when land is open, unencumbered and unimproved; instead, claimant must show by fair preponderance of evidence that that use was adverse); Brander v. Stoddard, 164 A.3d 889, 903 (Conn. App. Ct. 2017) (stating the same and stating that for plaintiff's claim of prescriptive easement, "the burden is on the defendants to prove that the plaintiff had permission to use the disputed property for grazing sheep and growing hay").

498. *Slack*, 984 A.2d at 745–46 (citation omitted); *Brander*, 164 A.2d at 903 (stating the same).

The position of California courts is also uncertain.[499] Decisions in 1984 and 1977 applied the PPAU.[500] However, a 1948 California Supreme Court decision eschewed the application of any presumption of adversity or permissiveness.[501] More recently, a 2008 intermediate appellate court reached the conclusion that the later decisions did not overrule the 1948 decision, but then refused to apply the PPAU.[502] In this case, the court eventually found that the alleged adverse users were the servient estate owner's sons, and thus, in the absence of "anything other than a normal father and son relationship," it concluded that the sons' use of a road on their father's land was not adverse.[503]

Frankly, rationalizing the case law in these states may be more trouble than it is worth. The more important point is that the Restatement Fourth certainly can bring more clarity to this area of prescriptive easement law by stating a strong threshold presumption of adverse use supplemented with several distinct and relatively well-demarcated exceptions in which a counter-presumption of permissive use would apply.

V. CONCLUSION

The current team of reporters for the Restatement Fourth have an opportunity to clarify an important area of American property law when they address the subject of prescriptive easements. Prescription plays a crucial architectural role in the broader structure of property law as it mediates between and intersects with the law of trespass, possession, and adverse possession. Recognition of a prescriptive easement turns an otherwise trespassory invasion of land owned or possessed by another into a non-possessory property right that will run with both the servient and dominant estate.

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499. *See* Larsson v. Hurst, No. F046355, 2005 WL 2293034, at *2 (Cal. Ct. App. Sept. 21, 2005) (observing that "California's law of prescriptive easements has a rather convoluted history, specifically regarding the element at issue—adverse versus permissive use").

500. Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 588 (Cal. 1984) ("continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence mere permissive use it will be sufficient to sustain a judgment"); MacDonald Properties, Inc. v. Bel-Air Country Club, 140 Cal. Rptr. 367, 373 (Cal. Ct. App. 1977) (undisputed use for 5-year prescriptive period raises presumption of claim of right and puts burden on party resisting easement to prove permissive use).

501. O'Banion v. Borba, 195 P.2d 10, 12–13 (Cal. 1948).

502. Grant v. Ratliff, 79 Cal. Rptr. 3d 902, 904–06 (Cal. Ct. App. 2008).

503. *Id.* at 906. For a source listing and discussing many other unpublished and technically uncitable California decisions addressing the contested neighborhood accommodation doctrine, see Eric C. Surette, *Neighborly Accommodation as a Defense Against Adverse Possession or Prescriptive Easement*, 56 A.L.R. 7th Art. 8 (2020).

Some scholars have continued to defend both prescription and adverse possession because of their capacity to cure errors and defects in conveyancing, because they bring stability to the reliance interests of long-term users and possessors and also honor community expectations, and because they provide a relatively mechanistic and cost-efficient tool for resolving title inconsistency disputes for a wide range of real estate market participants. Other scholars have argued that these doctrines should either be abolished or transformed because they reward trespass without any form of compensation, because they sow confusion and undermine the reliability of land records, and because other property law doctrines can accomplish similar systemic objectives without the same degree of potential demoralization to landowners.

Despite these rich scholarly debates about the value of prescription and adverse possession to the legal system and the fairness of the doctrines, the actual elements of a prescriptive easement claim are generally well understood and consistent across the United States. Previous Restatements of Property have contributed to this uniformity by highlighting the primary elements of a prescriptive easement claim; namely that the claimant must show that its or its predecessor's use of the alleged servient estate has been (1) open and notorious, (2) continuous and without interruption for the statutory period, and (3) adverse to (i.e., not subordinate to, or with the permission of) the interest of the alleged servient estate owner. Treatise authors and the Restatement (Third) of Property, however, have noted that courts use a wide variety of presumptions to solve the most difficult prescriptive easement claims—those in which there is clear, and undisputed evidence of the first two elements, but the origin of the claimant's use is otherwise unexplained and its status as adverse or permissive is highly contested.

This Article has shown that there are two "pure" or relatively invariant approaches to the question of framing adverse use—the PPAU, which is used in fourteen states, and the PPPU, which is used in only eight states (including the ambiguous case of Louisiana). Courts in the rest of the United States employ a more contextualized approach that starts with a general presumption of adverse use but then recognizes one or more exceptional situations that require application of a counter-presumption of permissive use.

This Article recommends that the Restatement Fourth reporters formalize this trend in the law and give it clear expression by adopting, as an express black letter rule, a version of what this Article calls the Presumption of Adverse Use with Specialized Exceptions (or the PAUSE approach). Ideally, the Restatement Fourth should adopt a rule that articulates the PPAU as the starting point for analysis but which switches to a presumption of permissive use only

if the putative servient estate owner establishes one of the following circumstances:

> (1) the parties or their predecessors are related by family ties**;**
> (2) the parties or their predecessors were subject to a prior contractual relationship such as an express license or a related right of way or easement contract;
> (3) claimants seek recognition of an easement in gross benefiting the public at large;
> (4) the land in dispute can be characterized as "wild" land; or
> (5) a well-understood community custom of neighborly accommodation in the locality at the time the alleged prescriptive use began.

The scope of these five exceptions will be relatively easy to determine and thus the additional complexity and indeterminacy in prescriptive easement law they create will be relatively circumscribed. By preserving a strong presumption of adverse use for cases that do not fall into one of these five exceptional categories, the Restatement Fourth will continue to preserve the utility of prescription and allow courts to give life to the important social and practical interests that have historically animated this long-standing property law doctrine.